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No.____

In the

Supreme Court of the United States

October Term, 1983

James Mabry, Commissioner,
Arkansas Department of Correction ..... *Petitioner*

V.

George Johnson ..... *Respondent*

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR PETITIONER
IN SUPPORT OF PETITION

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QUESTION PRESENTED FOR REVIEW

I.

IN THE ABSENCE OF A SHOWING OF DETRIMENTAL RELIANCE OR RESULTANT PREJUDICE, AND PRIOR TO THE ENTRY OF A GUILTY PLEA, DOES A DEFENDANT HAVE A CONSTITUTIONAL RIGHT TO SPECIFIC PERFORMANCE OF A PLEA PROPOSAL WHICH WAS WITHDRAWN 72 HOURS AFTER IT WAS MADE DUE TO A MISTAKE ON THE PART OF THE PROSECUTING ATTORNEY?

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OPINION BELOW

The decision of the United States Court of Appeals for the Eighth Circuit was rendered on May 6, 1983. Petitioner's Petition for Rehearing En Banc was denied on June 30, 1983.

JURISDICTION

The basis for this Court's jurisdiction in the present case is 28 U.S.C. §1254. The present Petition is presented within 90 days of the June 30, 1983 denial of the Petition for Rehearing En Banc and is therefore timely filed in accordance with 28 U.S.C. §2101.

CONSTITUTIONAL PROVISIONS INVOLVED

The present case involves the Due Process Clause of the Fourteenth Amendment and, arguably, the Sixth Amendment right to the assistance of counsel.

STATEMENT OF THE CASE

The respondent was convicted by a jury on November 23, 1970 of murder in the first degree and was sentenced to a term of life imprisonment. The conviction arose from an incident which occurred in a residence in Little Rock, Arkansas where, in the course of a burglary, the defendant and an accomplice were discovered by the occupants of the dwelling. An exchange of gunfire occurred which resulted in the death of Vicki Siscoe and the wounding of her father and the respondent. A more detailed summary of the facts is found in *Johnson v. State*, 252 Ark. 113, 114 (1972).

Subsequent to his conviction for murder, the respondent was found guilty of burglary and assault with intent to kill in connection with the entry and wounding of the deceased's father and was sentenced to a term of 21 years imprisonment.

In July, 1972, the Arkansas Supreme Court reversed the respondent's first degree murder conviction due to the trial court's failure to give a requested jury instruction. *Johnson v. State*, 252 Ark. 113 (1972).

Shortly after the reversal of the murder conviction, the public defender was appointed to represent the respondent at his retrial. On Friday, October 27, 1972, a deputy prosecuting attorney offered the public defender a plea proposal consisting of a 21 year sentence to be served concurrently with the 21 year sentence respondent was serving for burglary and assault. The public defender journeyed to the penitentiary where he informed the respondent of the plea proposal. Respondent, in his discussion with counsel, agreed to accept the proposal.

On Monday, October 30, 1972, the next working day after the offer had been made, the public defender called the prosecutor's office for the purpose of accepting the plea offer. The public defender was informed that a mistake had been made and that the sentence could not be made

concurrent but rather, would have to be consecutive to the previously imposed 21 year sentence. Thereafter, the case was assigned to the chief deputy public defender.

A trial date of November 8, 1972 was set for respondent's case. On November 9, a mistrial was declared and the case was reset for December 7, 1972. The case was subsequently rescheduled for February 26, 1973. On February 26, the respondent entered a plea of guilty to the charge of accessory after a felony murder and was sentenced to a term of 21 years, to be served consecutive to his previously imposed 21 year sentence.

State post-conviction relief was denied by the trial court and by the Arkansas Supreme Court in 1978. Respondent's petition for writ of habeas corpus was denied by the United States District Court for the Eastern District of Arkansas on September 16, 1981. On May 6, 1983, the District Court's decision was overturned by the Eighth Circuit Court of Appeals. The Eighth Circuit ordered specific performance of the proposed plea agreement in spite of the fact that there had been no showing that the accused had relied to his detriment on the proposed offer.

REASONS FOR GRANTING THE WRIT

Rule 17 of the Rules of the United States Supreme Court sets out the considerations governing review on certiorari. Among such considerations are: (a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; and . . . (c) When a . . . federal court of appeals has decided an important question of federal law (presumably including the federal constitution) which has not been, but should be settled by this Court . . . Petitioner submits that the question presented herein merits review by this Court. As of the date of the decision of the Eighth Circuit Court of Appeals in this case, only two courts of appeals had passed upon the question of whether an accused had a constitutional right to specific enforcement of a plea proposal in the absence of a showing of detrimental reliance. Those two courts had reached differing conclusions. See *Cooper v. United States*, 594 F.2d 12 (4th Cir. 1979) and *Government of Virgin Islands v. Scotland*, 614 F.2d 360 (3d Cir. 1980).

Petitioner further submits that although this Court has not yet passed upon the specific question presented herein, the decision below appears to run afoul of this Court's decision in *Santobello v. New York*, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971).

In overturning the decision of the district court, the Eighth Circuit Court of Appeals acknowledged that the plea proposal (21 years concurrent) was conveyed to respondent's counsel on Friday; that on the following Monday, respondent attempted to accept the plea proposal; that the prosecuting attorney indicated that a mistake had been made and the sentence must be consecutive rather than concurrent; that the respondent did not enter a plea of guilty in reliance on the proposal; and that the respondent had not performed any specific action in reliance upon the proposal. See Appendix "A", pp. 8-9 and f.n.8. The court

below found that the respondent had relied upon the plea proposal only to the extent that he had considered the terms offered, agreed to accept the proposal, and communicated his willingness to plead guilty to the prosecuting attorney. See Appendix "A" at p. 10. The Eighth Circuit, relying upon the decision of the Fourth Circuit in *Cooper v. United States, supra*, concluded that the respondent's constitutional expectation that the government would honor its proposal was violated and, although there had been no demonstration of prejudicial effect or detrimental reliance, concluded that the respondent was entitled to specific enforcement of the proposal.

Petitioner does not take issue with the assertion by the court below that there must be fairness in plea bargaining. Indeed, since the decision of this Court in *Santobello v. New York, supra*, fairness in plea bargaining has been viewed as having constitutional dimensions. However, it also appears clear from reading the *Santobello* decision that reliance upon the plea proposal is a necessary prerequisite to specific enforcement thereof.

In rendering Its opinion in *Santobello, supra*, this Court wrote: "When a plea rests in significant degree on a promise or agreement of the prosecutor so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." 404 U.S. at p. 262. The crux of the *Santobello* decision seems to be that although an accused has no right to have a plea accepted, once a bargain is struck and the accused detrimentally relies upon such agreement, the accused has the right to hold the prosecutor to his end of the bargain.

In *Virgin Islands v. Scotland, supra*, the Third Circuit adopted the *Santobello* rationale of requiring a showing of detrimental reliance upon the plea proposal as a prerequisite to ordering specific performance in a case in which the government attempted to add additional con-

ditions to a plea proposal after the accused indicated his acceptance, but before the entry of a guilty plea. A number of state courts appear to follow this same rationale. Consider: *People v. Barnett*, 113 Cal. App. 3d 563 (1981); *Shields v. Delaware*, 374 A.2d 816 (1977); cert. denied 434 U.S. 893; *State v. Reasbeck*, 359 So.2d 564 (Fla. 1978); *State v. Edwards*, 279 N.W.2d 9 (Iowa 1979); *People v. Heiler*, 79 Mich. App. 714, 262 N.W.2d 890 (1977); *State v. Collins*, 300 N.C. 142 (1980); *State v. Wheeler*, 95 Wash.2d 799 (1981); *State v. Beckes*, 100 Wis. 2d 1 (1980). The decision in *Virgin Islands v. Scotland*, is based upon sound constitutional principles of due process. 614 f. 2d at p. 365.

In *Cooper v. United States, supra*, the case relied upon by the court below, the Fourth Circuit strayed from the detrimental reliance requirement and concluded that under appropriate circumstances, a constitutional right may arise before any technical "contract" has been formed, and on the basis of expectations reasonably formed in reliance upon the honor of the government. 594 F.2d at p. 18. Closely intertwined into the *Cooper* decision was the theory that a defendant's confidence in his counsel's capability and professional responsibility may be jeopardized when the government attempts to, through defendant's counsel, change or retract a proffered plea agreement. Nothing in the opinion of the court below indicated that the change in the proposed plea agreement in the present case resulted in either a loss of confidence in the accused's attorney or in any way hindered defense counsel in his ability to defend the respondent.

Nor can it be said that the respondent's willingness to accept the plea proposal amounted to a sudden revelation of his involvement in the crime which was previously unknown or unproven. It is not to be forgotten that the respondent had previously been convicted of the murder for which he was being retried; and that he had likewise been convicted of burglary and assault with intent to kill a second victim in connection with the same incident. Under these circum-

stances, a willingness to "plead out" for no additional time in the penitentiary hardly amounts to a damaging admission.

Although the decision of the court below relies heavily upon the duty of the government to negotiate with scrupulous fairness, there is nothing in the opinion to indicate that the government in the present case was anything but scrupulous. The evidence tended to show that an honest mistake had been made by the prosecuting attorney.

A period of six months time passed from the date of respondent's arraignment on charges of murder until he ultimately entered a guilty plea to the charge of accessory after felony murder. During this six month period, a state of confusion existed for approximately 72 hours—Friday until Monday—in connection with a mistaken plea proposal. Approximately four months after the modification of the proposal to correct the mistake, the respondent entered a plea of guilty. The record is void of any evidence to indicate that during the 72 hours in which the mistaken offer stood, the respondent in any way relied upon the proposal to his detriment.

Faced with these facts, the Eighth Circuit Court of Appeals confronted two conflicting lines of authority: one required a showing of detrimental reliance in order to specifically enforce the plea proposal; the other allowed specific enforcement based upon the accused's expectation in the honor of the government. The court below chose the latter authority, thereby ruling that in the absence of evidence to demonstrate detrimental reliance by the accused and in the absence of evidence of bad faith or unscrupulous conduct on the part of the government, a mistaken term in a plea proposal which stood for 72 hours in a six month period may be specifically enforced as a matter of constitutional right.

The circuits remain split in ruling upon the question presented herein. The issue presented is one of major constitutional import which merits the attention of this Court. Petitioner respectfully requests that this Court examine the issue raised herein and resolve once and for all the question presented.

CONCLUSION

The question presented herein falls squarely within the considerations governing review as set out in Rule 17 of the Rules of the United States Supreme Court. This issue is of major constitutional import and the resolution thereof will have far reaching effect. Petitioner therefore prays that this Court consider the issue raised herein and lay to rest the conflict among the circuits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Dennis R. Molock, hereby certify that a copy of the foregoing Petition has been served upon the respondent herein by placing a copy of same in the U.S. Mail, postage paid, addressed to Richard Quiggle, Attorney at Law, 904 West Second St., P.O. Box 2651, Little Rock, Arkansas this 18th day of August, 1983.

/s/ DENNIS R. MOLOCK

APPENDIX "A"

United States Court of Appeals
For the Eighth Circuit
May 9, 1983
Attorney General
of
Arkansas

No. 81-2181

George Johnson,	*	
	*	
Appellant,	*	
	*	Appeal from the United
v.	*	States District Court
	*	for the Eastern District
James Mabry, Commissioner,	*	of Arkansas
Arkansas Department of Correction;	*	
	*	
Appellee.	*	

Submitted: October 15, 1982
Filed: May 6, 1983

Before LAY, Chief Judge, McMILLIAN and JOHN R. GIBSON, Circuit Judges.

McMILLIAN, Circuit Judge.

George Johnson appeals from a final order entered in the District Court for the Eastern District of Arkansas dismissing

his petition for writ of habeas corpus, 28 U.S.C. §2254. For reversal petitioner argues that the district court erroneously refused (1) to grant specific performance of a proposed plea bargain and (2) to shift the burden of proof to the state to show that petitioner's ineffective assistance of counsel was not prejudicial. For the reasons discussed below, we reverse and remand.

Petitioner's case, like those of many other state habeas petitioners, has become procedurally complicated. For a statement of the facts underlying petitioner's criminal convictions, see *Johnson v. State*, 252 Ark. 1113, 482 S.W.2d 600 (1972). According to the evidence presented by the state, in May 1970 petitioner and Eddie Jackson broke into the house of W.A. Siscoe with the intent to commit burglary. Mr. and Mrs. Siscoe and their daughter Vicki arrived home in the middle of the burglary. Vickie was the first person to enter the house; she confronted the intruders and screamed. Mr. Siscoe heard Vicki's screams and entered the house. One of the intruders threatened to kill him and grabbed Vicki and used her to shield his escape from the house. At this point shots were exchanged by one of the intruders and Mr. Siscoe. Vicki was fatally wounded, and petitioner and Mr. Siscoe were wounded.

Petitioner was convicted of first degree murder for the death of Vicki Siscoe and sentenced to life imprisonment. Petitioner was subsequently convicted of burglary and assault with intent to kill on June 15, 1971; these charges arose out of the same incident. Petitioner was sentenced to 21 years imprisonment for the burglary and 12 years for the assault, to be served concurrently. On July 17, 1972, petitioner's murder conviction was reversed by the Arkansas Supreme Court for failure to give a requested jury instruction and remanded for a new trial. *Johnson v. State*, 482 S.W.2d at 606.

The state trial court appointed Harold Hall of the public defender's office to represent petitioner. The following facts about the plea bargaining negotiations are not disputed. On Friday, October 27, 1972, the prosecuting

attorney contacted Hall and proposed a 21-year sentence, to be served *concurrently* with petitioner's burglary and assault sentences, in exchange for a guilty plea to the charge of accessory after a felony murder. Hall told petitioner the terms the next day, Saturday, October 28, 1972. Petitioner agreed to accept the plea proposal. The following Monday, October 30, 1972, Hall called the prosecuting attorney and accepted the plea bargain. However, the prosecuting attorney told Hall that a mistake had been made and withdrew the proposal. The prosecuting attorney then proposed a recommendation of a 21-year sentence to be served *consecutively* to petitioner's other sentences. Apparently Hall did not respond to this second proposal and assigned the case to another public defender, John Achor.

Petitioner proceeded to trial November 8, 1972. On November 8, 1972, the trial court declared a mistrial, evidently on the ground of prejudicial newspaper publicity, excused the jury and rescheduled the trial for December 7, 1972. The trial was later continued to February 26, 1973, when petitioner entered a guilty plea to the charge of accessory after a felony murder and was sentenced to 21 years imprisonment, to be served *consecutively* to the burglary and assault sentences.

Petitioner sought post-conviction relief in the state courts on the grounds of mistake and ineffective assistance of counsel. The state trial court denied relief and its decision was affirmed by the Arkansas Supreme Court in an unpublished opinion, *Johnson v. State*, No. CR-78-18 (Ark. June 5, 1978). Petitioner then filed the petition for writ of habeas corpus, alleging mistake, coercion and ineffective assistance of counsel. Petitioner argued that he did not understand the nature and consequences of the plea bargain and pled guilty only because his defense attorney threatened him with life imprisonment if he went to trial. Petitioner also argued that he received ineffective assistance of counsel because his defense attorney did not

discuss the case with him until ten minutes before trial, failed to interview witneses and did not explain the nature and consequences of the plea bargain.

The district court referred the petition to a magistrate for an evidentiary hearing and report and recommendation. Petitioner, Hall and Achor testified at the first evidentiary hearing in August 1979. At this point petitioner raised an additional constitutional issue, alleging that the prosecuting attorney's withdrawal of the plea bargain proposal after petitioner's acceptance was unconstitutional. The magistrate held supplemental evidentiary hearings in October and December 1980, at which petitioner, Lacey Gordon[1] and Benny Kelley[2] testified.

The district court adopted the magistrate's report and recommendation, *Johnson v. Mabry*, No. PB-C-78-139 (E.D. Ark. Sept. 17, 1981), finding that petitioner's mistaken belief about the sentence he would receive if he pled guilty was not reasonably justified,[3] that petitioner's guilty plea was not induced by threats or misrepresentations by

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[1]Lacey Gordon is a friend of petitioner's and one of three persons petitioner claims were with him on the night of the burglary and shooting.

[2]Benny Kelley is a friend of petitioner's and one of three persons petitioner claims were with him on the night of the burglary and shooting.

[3]*See Griffith v. Wyrick*, 527 F.2d 109, 113 (8th Cir. 1975); *United States ex rel. Curtis v. Zelker*, 466 F.2d 1092, 1098 (2d Cir. 1972), *cert. denied*, 410 U.S. 945 (1973). Here, the record contains statements made by the state trial judge before acceptance of the guilty plea that petitioner "agreed to take twenty-one years on top of the twenty-one he's got [for the burglary and assault] which will make a total of forty-two years." The court also credited the testimony of Achor, who testified that he discussed the nature and consequences of the plea bargain with petitioner, specifically explained to petitioner that the proposed plea bargain sentence represented a total sentence of 42 years and even attempted to compare the possibility of parole for a 42-year sentence with that of a life sentence.

defense counsel,[4] and that petitioner was not prejudiced by ineffective assistance of counsel.[5] The court also rejected

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[4]The court concluded that petitioner's allegation of a mistaken belief about the sentence of the guilty plea (that petitioner voluntarily pled guilty but thought the sentence was for 21 years concurrent) was logically inconsistent with his allegation of coercion (that defense counsel threatened that petitioner would be convicted and sentenced to life if he went to trial). Slip op. at 6. We also note that defense attorney Achor testified that after reviewing the transcript of petitioner's first trial and the opinion of the Arkansas Supreme Court and interviewing Siscoe and several of the police witnesses, he believed that if petitioner went to trial, he would be convicted and would probably receive a life sentence and that he told this to petitioner.

[5]The court found that petitioner's defense attorney failed to attempt to locate and interview Eddie Jackson, Lacey Gordon and Benny Kelley. *E.g., Ford v. Parratt*, 638 F.2d 1115, 1117 (8th Cir.) (failure to investigate rumor), *vacated on other grounds*, 454 U.S. 934 (1981); *Morrow v. Parratt*, 574 F.2d 411, 413 (8th Cir. 1978) (failure to interview witnesses). Although Achor testified that petitioner never mentioned Gordon or Kelley, the court noted that petitioner testified at the first trial that he had been riding around in a car with Jackson, Gordon and Kelley that night and that Gordon and Kelley had dropped Jackson and petitioner off in front of the Siscoe house. Both Gordon and Kelley testified at the supplemental evidentiary hearings that they knew petitioner, were not involved with petitioner or Jackson on the night of the shooting and only heard about the incident "on the street." The record also indicates that Jackson, the individual who broke into the Siscoe house that night and who, according to petitioner, fired the gun, was in the state penitentiary at the time of petitioner's retrial and guilty plea. It appears, however, that Jackson was released on parole in 1977 and is currently wanted by state authorities for violating the conditions of his parole. Jackson has been unavailable as a witness.

The court concluded that defense counsel's failure to attempt to locate and to interview Gordon and Kelley did not prejudice petitioner's ability to make an intelligent and voluntary plea. Slip op. at 9; *see Ford v. Parratt*, 638 F.2d at 1118; *United States v. Davis*, 616 F.2d 365, 366 (8th Cir. 1980) (per curiam); *Nevels v. Parratt*, 596 F.2d 344, 346 (8th Cir.), *cert. denied*, 444 U.S. 859 (1979). Although the court agreed that the unavailability of Jackson was a changed circumstance beyond petitioner's control, the court refused to shift the burden of proof to the state to show the absence of prejudice in defense counsel's failure to attempt to locate and interview Jackson. Slip op. at 9, *citing McQueen v. Swenson*, 498 F.2d 207, 220 (1974). The court concluded that it was unreasonable to assume that Jackson's testimony would have differed from that of Gordon or Kelley, have been helpful to petitioner, or have influenced his decision to plead guilty.

petitioner's claim that the prosecuting attorney's withdrawal of the plea bargain proposal was unconstitutional.[6] Slip op. at 11-12, *citing Government of Virgin Islands v. Scotland*, 614 F.2d 360, 363-65 (3d Cir. 1980) (*Scotland*). The district court dismissed the petition and this appeal followed. On appeal petitioner argues that (1) he has a constitutional right to enforcement of the plea bargain proposal and (2) because of the changed circumstances beyond petitioner's control, the court should have shifted the burden of proof to the state on the question of the absence of prejudice. Because we agree with petitioner's first argument, we do not reach the burden of proof question. *See* note 5 *supra*.

In 1971 the Supreme Court recognized that the "disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called 'plea bargaining,' is an essential component of the administration of justice," which, if "[p]roperly administered, . . . is to be encouraged." *Santobello v. New York*, 404 U.S. 257, 260 (1971); *see also Brady v. United States*, 397 U.S. 742, 751-52 (1970) (discussing advantages of plea bargained dispositions for criminal justice administration). The Court's approval of plea bargaining "presuppose[d] fairness in securing agreement between an accused and a prosecutor." *Santobello v. New York*, 404 U.S. at 261. The Court held that "[t]his phase of the process of criminal justice, and the adjudicative element inherent in accepting a plea of guilty, must be attended by safeguards to insure the defendant what is reasonably due in the circumstances." *Id.* at 262. The source of the fairness requirement is constitutional, presumably substantive due process, *see Cooper v. United States*, 594 F.2d 12, 15-16 (4th Cir. 1979) (*Cooper*); *see also*

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[6] As noted by the court below, petitioner did not raise this issue in the post-conviction proceedings in Arkansas state courts. However, the Arkansas courts will not entertain successive petitions for relief, at least not in noncapital cases. Therefore, the court concluded that petitioner had exhausted his available state remedies. Slip op. at 10. We agree.

Santobello v. New York, 404 U.S. at 266-67 (Douglas, J., concurring) (specifically noting that *Santobello* is a state case over which the Supreme Court has no supervisory jurisdiction and recognizing a constitutional basis for the holding); Westen & Westin, *A Constitutional Law of Remedies for Broken Plea Bargains*, 66 Calif. L. Rev. 471, 474-75 n.10, 476 n.16 (1978) (hereinafter *Broken Plea Bargains*); Comment, *Specific Enforcement to Ensure Due Process in Plea Bargaining*, 21 Wm. & Mary L. Rev. 521 (1979), and mandates that "the most meticulous standards of both promise and performance must be met by prosecutors engaging in plea bargaining." *Correale v. United States*, 479 F.2d 944, 947 (1st Cir. 1973); *see United States v. Bowler*, 585 F.2d 851, 854 (7th Cir. 1978) ("to protect the plea bargaining defendant from overreaching by the prosecutor and to insure the integrity of the plea bargaining process"); *Palermo v. Warden*, 545 F.2d 286, 296 (2d Cir.), *cert. denied*, 431 U.S. 911 (1976); *Geisser v. United States*, 513 F.2d 862, 863 (5th Cir. 1973); *cert. denied*, 450 U.S. 1031 (1981) (following several remands).

In general the legal analysis in plea bargaining cases has relied heavily upon contract law principles, in particular emphasizing contract formation (offer and acceptance), breach, estoppel (entry of guilty plea or detrimental reliance), and remedies (rescission or specific performance). *See, e.g., Scotland*, 614 F.2d at 364;[7] *Cooper*, 594 F.2d at 16 (citing cases from Fourth Circuit); *People v. Calloway*, 29 Cal. 3d 666, 631 P.2d 30, 175 Cal. Rptr. 596 (1981) (bank); *People v. Kaanehe*, 19 Cal. 3d 1, 559 P.2d 1028, 136 Cal. Rptr. 409 (1977); *Shields v. State*, 374 A.2d 816, 819 (Del.), *cert. denied*, 434 U.S. 893 (1977); *see generally Broken Plea Bargains*, 66 Calif. L.Rev. at 525. Other cases, however,

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[7] "The bargaining process has often been analogized to contract principles, and plea agreements are often likened to unilateral contracts – consideration is not given for the prosecutor's promise until the defendant actually enters his [or her] plea of guilty." *Government of Virgin Islands v. Scotland*, 614 F.2d 360, 364 (3d Cir. 1980) (*Scotland*) (footnote omitted).

have recognized that contract law is useful only as an analogy. *See United States v. Calabrese*, 645 F.2d 1379, 1390 (10th Cir.) (analogy to contract law is not determinative in plea negotiations), *cert. denied*, 451 U.S. 1018 (1981); *Cooper*, 594 F.2d at 19-20; *United States ex rel. Selikoff v. Commissioner of Correction*, 524 F.2d 650, 654 (2d Cir. 1975), *cert. denied*, 425 U.S. 951 (1976); *cf. Brewer v. Williams*, 430 U.S. 387, 401 n.8 (1977) ("We do not deal here with notions of offer, acceptance, consideration, or other concepts of the law of contracts. We deal with constitutional law."); *Roe v. United States Attorney*, 618 F.2d 980, 981 (2d Cir.) (per curiam) (court of appeals will not use doctrine of actual authority in context of promises made by government officials), *cert. denied*, 449 U.S. 856 (1981); *United States v. Bowler*, 585 F.2d at 854 ("A plea agreement is not an appropriate context for the Government to resort to a rigidly literal approach in the construction of language.") *See generally Broken Plea Bargains*, 66 Calif. L. Rev. at 527-28 (proposing theory of "constitutional contracts").

The analogy between contracts and plea agreements works well in the usual plea bargain case, which involves the entry of a guilty plea, or the performance of some other action, following plea negotiations and an agreement about specific terms. *E.g., United States v. Runck*, 601 F.2d 968, 970 (8th Cir. 1979) (on petition for rehearing) (following entry of negotiated plea, dispute arose over whether part of sentence was within plea agreement accepted by district court). Traditional contract principles, however, are of little guidance in a plea proposal case like the present one. Here, as in *Cooper* and *Scotland*, we are confronted with a fact situation that falls short of a plea bargain.[8] Petitioner did not enter a plea of guilty in court and has not performed any specific action in reliance upon the plea bargain. *Compare Palermo v. Warden*, 545 F.2d at 290 (defendants offered

[8]Here, the prosecuting attorney proposed the 21-year concurrent sentence on Friday; the defense attorney discussed the plea proposal with petitioner on Saturday and petitioner agreed to accept the plea proposal

that day. The defense attorney contacted the prosecuting attorney on Monday and accepted the plea proposal, but the prosecuting attorney then withdrew the plea proposal, explaining only that a mistake had been made. In *Cooper* the relevant events occurred on the same day: about 11 a.m. the prosecuting attorney and defense attorney discussed the terms of the plea proposal; the defense attorney immediately discussed the plea proposal with the defendant, who agreed to accept; about 12 p.m. the defense attorney attempted to contact the prosecuting attorney; about 1:30 p.m. the prosecuting attorney's superior reviewed the plea proposal and instructed the prosecuting attorney to withdraw the plea proposal before the defense attorney accepted. 594 F.2d at 15. In *Scotland* the time interval is greater, but the facts are essentially the same. 614 F.2d at 363. On November 11 the prosecuting attorney made its plea proposal; the terms were communicated to the defendant on November 29 and defendant agreed to accept them at that time; the prosecuting attorney, however, added a new condition to the plea proposal; the defendant moved for specific performance of the initial plea proposal. *Id.* at 361-62.

Present in each case are the following factors that the *Cooper* court considered crucial to the finding of a constitutional right and violation:

> [1] the proposal was specific and unambiguous in form, and [2] was made without any reservation related to a superior's approval or otherwise; [3] its content was reasonable in context; [4] it was made by a prosecutor with apparent (and probably actual) authority at the time; [5] it was communicated promptly to the defendant so that no question of staleness was involved; [6] the defendant assented promptly and unequivocally to its terms, indicated . . . assent to [defense] counsel, and was entitled so far as the record shows to assume that its communication to the government would consummate the plea agreement; [7] defense counsel did in fact within a matter of a few hours [or within several days] communicate defendant's acceptance to the government, by sheer fortuity being told of the government's "withdrawal" before [defense counsel] could vocalize [defendant's] "acceptance"; and finally, [8] the reason for the attempted withdrawal had nothing to do with extenuating circumstances affecting the government's or any public interest that were unknown when the proposal was extended, but [apparently] lay simply in a superior's second-guessing of a subordinate's judgment.

594 F.2d at 19. *Cf. People v. Calloway*, 29 Cal. 3d 666, 631 P.2d 30, 175 Cal. Rptr. 596, 603 n.3 (1981) (bank) (Bird, C.J., dissenting) (factors which favor the prosecution's choice of remedy for broken plea bargains: fraud by the defendant, additional information developed later and changed circumstances); *People v. Johnson*, 10 Cal. 3d 895, 519 P.2d 604, 112 Cal. Rptr. 556 (1974) (bank) (defendant concealed true name and past criminal record).

reduced sentences and early parole in exchange for return of stolen jewelry); *See United States v. Bowler*, 585 F.2d at 852 (plea agreement provided for dismissal of counts and recommended sentence if defendant cooperated in further prosecutions and other investigations). However, petitioner did rely on the plea proposal to the extent that he considered the terms offered, agreed to accept the plea proposal and communicated his willingness to plead guilty to the prosecuting attorney.

In *Cooper* the Fourth Circuit found "the constitutional right to 'fairness' [set forth in *Santobello*] to be wider in scope than that defined by the law of contract" and recognized "a constitutional right to enforcement of plea proposals [which] may arise before any technical 'contract' has been formed, and on the basis alone of expectations reasonably formed in reliance upon the honor of the government in making and abiding by its proposals." 594 F.2d at 16-18 (footnotes omitted). The *Cooper* court based this constitutional right on substantive due process: it is simply unfair to permit the government in effect to go back on its word. *Id.* at 18-19; *cf. Broken Plea Bargains*, 66 Calif. L. Rev. at 513 (arguing that *Santobello* can be understood as extending constitutional protection to the personal expectations created in defendants by plea agreements with the state). The *Cooper* court also relied upon the sixth amendment right to effective assistance of counsel:

> Because prosecutors are required to conduct plea negotiations through defense counsel, the government's positions and communications in plea discussions are necessarily mediated through his [or her] counsel . . . . To the extent that the government attempts through defendant's counsel to change or retract positions earlier communicated, a defendant's confidence in his [or her] counsel's capability and professional responsibility, as well as the government's reliability, are necessarily jeopardized and the effectiveness of counsel's assistance easily compromised.

594 F.2d at 18-19 (footnote omitted). The holding in *Cooper* was very narrow:

> When . . . a proposal—specific, unambiguous and not unreasonable on its face—is offered by the government to a defendant through his [or her] counsel, constitutional fairness requires that it be fulfilled if within a reasonable time the defendant unequivocally [agrees to accept] it, and unless in the interval extenuating circumstances affecting the propriety of the proposal that were unknown to and not reasonably discoverable by the government when the proposal was made have supervened or become known.

Id. at 19; *see* note 8 *supra* (listing specific factual considerations relied upon by court). *Cf.* Comment, 21 Wm. & Mary L. Rev. at 536-39 (arguing procedural due process as preferable constitutional basis for *Cooper* holding).

The Third Circuit in *Scotland* rejected the Fourth Circuit's due process analysis on the grounds that it not only interfered with prosecutorial discretion[9] and discouraged pleas,[10] but, more importantly, was unnecessary because, in the absence of detrimental

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[9] "[B]inding the prosecutor to his [or her] original plea [proposal] does interfere with his [or her] discretionary functions, i.e., determining what he [or she] feels is fairest in light of the defendant's circumstances, the government's resources, and the statute involved." *Scotland*, 614F.2d at 364 (footnote omitted).

[10] [Prosecutors] will be reluctant to offer to bargain until they are very sure that they want to be bound by the offer. The fact that the government would have to be very careful about all the elements of the offer certainly is not detrimental. However, if the result of the [*Cooper*] rule is either a delay in bargaining or fewer plea proposals, there is also a consequent diminished savings of prosecutorial and judicial resources. Moreover, the advantages of quick disposition and quick punishment are also diminished.

Id.

reliance, a jury trial is an adequate remedy.[11] 614 F.2d at 364-65. The Third Circuit also found no implication of the sixth amendment right to effective assistance of counsel in the government's withdrawal of the plea propoosal.[12]

We believe that the *Cooper* analysis should be followed. This approach recognizes the limited usefulness of contract principles in the plea bargaining context. Plea bargaining involves more than commercial law. Because the entry of guilty plea constitutes a waiver of fundamental constitutional rights, *Santobello v. New York*, 404 U.S. at 264 (Douglas, J., concurring), plea bargains are not just contracts in which the prosecution exchanges the dismissal or reduction of charges and recommendations on sentencing for the defendant's guilty plea. Imposing upon the government the duty to conduct plea bargaining with scrupulous fairness, which, in the present case, would

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[11] [The fundamental right to trial by jury] would be belittled if we held it to be an insufficient "remedy" or result for a defendant who has not been induced to rely on the plea to his detriment. The prosecutor is under no duty to plea bargain—if no offer is made, the defendant is entitled to a trial. There is no rational basis for holding, in esence, that a trial is sufficient for the defendant who has not been offered a plea and insufficient for the one who has.

Id. at 365.

[12] We note that in [all] plea negotiations, even when they do not involve the withdrawal of a plea proposal, there is a possibility that the defendant may lose faith in his [or her] attorney when, for example, the government fails to offer any plea proposal or offers only an unfavorable one. This factor, without more, is not enough to violate the defendant's sixth amendment right. The appropriate focus for determining whether the right to effective counsel has been violated is on defense counsel and his [or her] performance rather than an defendant's perception of defense counsel.

Id. at 363 (footnote omitted). Of course, the court in *Cooper* relied upon the sixth amendment right to effective assistance of counsel as another source of "the government's fundamental duty to negotiate with scrupulous fairness in seeking guilty pleas." 594 F.2d at 19.

require the government to honor the terms of its plea proposal, is consistent with the "fairness" requirement set forth in *Santobello*. As noted in *Cooper*, "constitutional decisions cannot be made to turn in favor of the government on the fortuities of communications or on a refusal to accord any substantive value to reasonably induced expectations that government will honor its firmly advanced proposals." 594 F.2d at 17.

We do not agree that the *Cooper* analysis improperly restricts prosecutorial discretion. The government does not have to initiate or participate in plea bargaining. *See Weatherford v. Bursey*, 429 U.S. 545, 561 (1977). However, once the government does so, it must negotiate with "scrupulous fairness." *Cooper* does not restrict the particular terms that the government may propose during plea negotiations; the government may make conditional proposals and may withdraw or modify outstanding proposals that have not been accepted or rejected after a reasonable period of time. *Cooper* does, however, require the government to honor whatever terms it has proposed if they are promptly and unequivocally agreed to by the defendant. In practice, this means that government attorneys may have to become better organized and scrutinize plea proposals before discussing them with defense counsel. *See*, 594 F.2d at 20. Further, requiring the government to conduct plea negotiations in a more orderly manner should not necessarily discourage guilty pleas. A more orderly method should reduce arbitrary action and promote greater consistency in the disposition of similar cases, thus encouraging defendants to enter pleas. *See* Comment, 21 Wm. & Mary L. Rev. at 536-38. Moreover, *Cooper* expressly contemplates that the government can withdraw a plea proposal or reopen plea negotiations, even after the plea proposal has been accepted by the defendant, if the government demonstrates that the plea proposal was based upon inaccurate or incomplete information, for example, if the defendant misrepresents or conceals relevant information or there is additional information that

was not reasonably discoverable at the time the plea proposal was offered. 594 F.2d at 19.

Nor can we agree that a jury trial is an adequate remedy in cases like the present one. In terms of the contract law analogy, trial does not provide the defendant with the benefit of the bargain, that is, jury trial will not protect the defendant's reasonable expectations that the government will honor its proposals. Nor does the alternative of jury trial really address the conduct of the government. We are concerned here with what the Fourth Circuit in *United States v. Carter*, 454 F.2d 426, 428 (4th Cir. 1972) (banc), *cert. denied*, 417 U.S. 933 (1974) (following remand), characterized as "the honor of the government" and "public confidence in the fair administration of justice." Here, the government in effect promised to recommend a specific sentence if petitioner agreed to plead guilty to a specific charge. If we were to hold that jury trial is an adequate remedy in these circumstances, we would have no effective way to discourage the potential abuse of the plea bargaining process. We will not allow the government to take advantage of petitioner's acceptance of the plea proposal, in the absence of any change in the underlying circumstances, and to exploit petitioner's decision to plead guilty by further hard bargaining and by recommending a longer sentence. *Compare Bordenkircher v. Hayes*, 434 U.S. 357, 360-65 (1978) (no violation of due process by prosecutor who carries out threat made during plea negotiations to have accused reindicted on more serious charges on which he is plainly subject to prosecution if he does not plead guilty to offense with which he was originally charged).

In sum, we stress that our holding, like that in *Cooper*, is very narrow and dependent upon the specific facts. *See* note 8 *supra*. The appropriate remedy is a difficult problem in plea bargain cases. *E.g., Santobello v. New York*, 404 U.S. at 263 (specific performance or withdrawal of plea); *Id.* at 266-67 (Douglas, J., concurring); *Correale v. United States*, 479 F.2d at 949-50; *see also Broken Plea Bargains*, 66 Calif.

L. Rev. at 474-76. Here, petitioner seeks enforcement of the plea proposal. Accordingly, we reverse the dismissal of the petition for habeas corpus and remand the case to the district court with directions to grant the writ of habeas corpus unless the state resentences petitioner in accordance with the concurrent sentence plea proposal within 120 days of the filing of this opinion.

JOHN R. GIBSON, Circuit Judge, dissenting.

I respectfully dissent. I believe the better view is that detrimental reliance is necessary to enforce an offer for a plea bargain. *Government of Virgin Islands v. Scotland*, 614 F.2d 360 (3d Cir. 1980). My view and that in *Scotland* is not based upon contract principles. As stated in *Scotland*, detrimental reliance implicates due process guarantees. 614 F.2d at 365. The court in *Scotland*, discussed *Santobello v. New York*, 404 U.S. 254 (1971), and reasoned that *Santobello* recognized a basic estoppel principle. In *Santobello* the guilty plea had been entered on June 16, 1969, in reliance on an offer that the prosecuting attorney would not recommend a sentence. It was only when the defendant appeared before a different judge for sentencing on January 9, 1970, that he learned that the agreement had been broken. *Santobello* thus dealt with a situation in which there had been detrimental reliance.

I believe that the majority has adopted a chameleon approach to reliance. The majority first states that petitioner "has not performed any specific action in reliance upon the plea bargain." Slip op. at 09-10. It continues "[h]owever, petitioner did rely on the plea proposal to the extent that he considered the terms offered, agreed to accept the plea proposal and communicated his willingness to plead guilty to the prosecuting attorney." Slip op. at 10.

It is abundantly clear that the majority has found no detrimental reliance in this case, and its holding requires no detrimental reliance. The majority specifically adopts the

reasoning in *Cooper v. United States*, 594 F.2d 12 (4th Cir. 1979), as opposed to the approach in *Scotland*. *Scotland* requires a showing of detrimental reliance to enforce a plea offer, but *Cooper* makes no such requirement. Accordingly, the extended discussion adopting *Cooper* is unnecessary unless the majority really is finding that there was no detrimental reliance in this case. If there was detrimental reliance, both *Scotland* and *Cooper* would support enforcement of the plea offer.

The magistrate in his report and the district court in its order adopting the report concluded that no detrimental reliance was present. Immediately after a lengthy quotation from *Scotland* underscoring the distinction that *Cooper* would allow specific performance of a plea offer where there was no detrimental reliance, the magistrate stated that the case was factually similar to *Cooper*. The petition for habeas corpus as originally filed makes no reference to detrimental reliance, nor does the motion to amend filed by petitioner's counsel. Petitioner's counsel, in his objections to the proposed findings and conclusions details a finding of detrimental reliance based upon counsel's lack of preparedness to go to trial November 8, 1972. This argument does not bear upon the issue before us, however, as the November 8 trial resulted in a mistrial and petitioner's guilty plea was not entered until February 26, 1973.

Cooper enumerated several limitations on its holding. Among the qualifications stated in *Cooper* is that the plea offer be reasonable in context. Johnson had originally been convicted of first degree murder and sentenced to life imprisonment. The conviction on this charge was set aside and the guilty plea now before us was later entered to the lesser charge of "accessory after a felony murder." Johnson's conviction of burglary carried a twenty-one year sentence and his assault with intent to kill conviction carried a twelve year concurrent sentence. I question whether we can conclude it is reasonable for the prosecutor

to offer a concurrent twenty-one year sentence on the murder charge, or accessory after a felony murder charge, which would result in defendant's receiving the same sentence for murder, burglary and assault that he had received for burglary and assault alone. There is no explanation in the record as to the nature of the mistake that was the reason for the withdrawal of the plea offer. We can only speculate that the prosecutor may have intended to offer a consecutive twenty-one year sentence but mistakenly said "concurrent". That there was a mistake in making the offer in this case, however, is further distinction from the limited circumstances in *Cooper*, which involved the overruling of a subordinate by a superior in the United States Attorney's office.

Cooper stressed the significance of this distinguishing circumstance in the following statement:

> This necessarily means that once presented, such a proposal may not be withdrawn in the face of proffered acceptance for no other reason than that a superior disagrees with an apparently authorized subordinate's judgment in making it.

Cooper v. United Staes, 594 F.2d at 19.

While *Cooper* is careful to make plain the factual limitations on the scope of its holding and the majority here seems to do so, the net result in this case is simply to expand the *Cooper* rule to an unacceptable extreme.

The majority also holds that a jury trial is an inadequate remedy where a plea bargain offer is withdrawn.[1] I find more persuasive the reasoning in *Scotland* that the great constitutional right to trial by jury is an adequate remedy. While it is true, as the majority states, that a jury trial will not give the defendant the

[1]Interestingly the majority opinion reverts to the contract law analogy in discussing this question.

benefit of his bargain with the government, he is not entitled to any particular sentence within the range provided in the statute for the crime with which he is charged. When the government mistakenly makes an offer and then withdraws it, defendant is not being deprived of a specific sentence to which he has a constitutional right.

The majority and *Cooper* make much of fairness. In *Cooper*, however, the withdrawal of the plea offer based on the superior's overruling of the subordinate is a distinct kind of unfairness to the defendant. But here a mistake by the prosecutor involves the interest not only of the defendant, but of the public as well, and has fairness implications of a far different nature. A mistake should be given different treatment from what was at best the insistance on an organizational, if not bureaucratic, prerogative.

For the foregoing reasons, I would affirm.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT

83-328

No. ____

Supreme Court, U.S.
FILED
SEP 24 1983
ALEXANDER L. STEVAS,
CLERK

In the

Supreme Court of the United States

October Term, 1983

James Mabry, Commissioner
Arkansas Department of Correction ..... *Petitioner*

V.

George Johnson ..... *Respondent*

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

SUPPLEMENTAL APPENDIX

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No. ____

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TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

SUPPLEMENTAL APPENDIX

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

GEORGE JOHNSON — PETITIONER

VS. — CASE NO. PB-C-78-139

JAMES MABRY, Director, Arkansas
Department of Correction — RESPONDENT

JUDGMENT

Pursuant to the Order entered this date, it is Adjudged that the petitioner's petition for a writ of habeas corpus be, and it is hereby, dismissed.

DATED this 16th day of September, 1980.

/s/ William R. Overton
United States District Judge

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

GEORGE JOHNSON PETITIONER

VS. CASE NO. PB-C-78-139

JAMES MABRY, Director, Arkansas Department of Correction RESPONDENT

ORDER

The Court has received a Report with Recommended Findings and Conclusions from Magistrate Henry L. Jones, Jr. After careful review of those Findings and Conclusions, the Court adopts them in their entirety.

THEREFORE, IT IS ORDERED that the petitioner's petition for a writ of Habeas Corpus is dismissed.

IT IS SO ORDERED this 16th day of September, 1980.

/s/ William R. Overton
United States District Judge

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

GEORGE JOHNSON PETITIONER

VS. CASE NO. PB-C-78-139

JAMES MABRY, Director, Arkansas
Department of Correction RESPONDENT

REPORT WITH RECOMMENDED
FINDINGS AND CONCLUSIONS

The petitioner, an inmate of the Arkansas Department of Correction, was convicted by a jury on November 23, 1970, of murder in the first degree and was sentenced to a term of life imprisonment. On June 15, 1971, he was found guilty of burglary and assault with intent to kill and sentenced to twenty-one years. These charges arose from the same incident for which petitioner received the life sentence. Petitioner's conviction of first degree murder was subsequently reversed by the Arkansas Supreme Court due to the trial court's failure to give a requested jury instruction. *Johnson v. State*, 252 Ark. 1113 (1972). On February 26, 1973, petitioner entered a plea of guilty to the charge of accessory after a felony murder and was sentenced to a term of twenty-one years, to run consecutively to the twenty-one year sentence he was serving for burglary and assault with intent to kill.

Petitioner sought post-conviction relief pursuant to Rule 37 of the Arkansas Rules of Criminal Procedure alleging ineffective assistance of counsel and coerced guilty plea. The Pulaski County Circuit Court denied petitioner's request for post-conviction relief and, in an unpublished opinion, the Arkansas Supreme Court affirmed on June 5, 1978. He then filed a petition for a writ of habeas corpus under 28 U.S.C. §2554.

Petitioner alleges that his confinement is unconstitutional for two reasons:

> (1) His plea of guilty was unlawfully induced and not made voluntarily, since he did not understand the nature and consequence of the plea and accepted the offer of twenty-one years only after being threatened by counsel; and
>
> (2) He was denied effective assistance of counsel in that his appointed counsel only talked with him for ten minutes, did not explain the nature and consequences of a plea of guilty, did not interview any witneses, and did not discuss his version of the facts with him.

The respondent admits that the petitioner has exhausted his state remedies as to these grounds as required by 28 U.S.C. §2554 (b).

In that this is a habeas corpus proceedings, the findings of the state trial court are presumptively correct unless (1) the merits of the factual dispute were not resolved in the state court hearing; (2) the fact finding procedure employed by the state court was not adequate to afford a full and fair hearing; (3) the material facts were not adequately developed at the state court hearing; (4) the state court lacked jurisdiction of the subject matter or over the person of the applicant in the state court proceeding; (5) the applicant was an indigent and the state court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the state court proceeding; (6) the applicant did not receive a full, fair, and adequate hearing in the state court proceeding; (7) the applicant was otherwise denied due process of law in the state court proceeding; (8) or unless, on the record as a whole, the federal court concludes that the factual determination by the state court is not fairly supported by the record. 28 U.S.C. §2554 (d).

Here the presumption applies because the record reveals that none of the above circumstances exist. In a case

where the district court had granted habeas relief, the Eighth Circuit made the following comments:

> The federal district court in fact relied upon the exact testimony taken in the state proceeding. The federal district judge made no finding that the 1952 state court factual determination was *not* supported by the record. Under these circumstances, "the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the state court was erroneous." *See* §2554 (d).

In Re Parker, 423 F.2d 1021 (8th Cir.); *cert. denied*, 398 U.S. 966 (1970).

The following review of the facts by the Arkansas Supreme Court in its reversal of Johnson's conviction, sets the background for the issues addressed herein.

> Mr. and Mrs. W.A. Siscoe and their daughter Vicki arrived home from the Siscoe grocery store on the night of May 22, 1970, at about 10:45 p.m. Mrs. Siscoe drove her vehicle into the driveway, parked it and awaited her daughter and husband, who followed her in a vehicle driven by the husband. He stopped his car and the daugher got out, opened the front door and entered the Siscoe dwelling. Her father heard her screaming inside the house and ran inside, armed with a .38-caliber revolver, where he became aware of the presence of an intruder who threatened to kill him and began firing a weapon. When Siscoe returned the fire, the intruder grabbed Vicki, swung her around as a body shield and a scuffle ensued during which Siscoe fired, or attempted to fire over the intruder's shoulder. Shots were fired by the father and by at least one intruder. In the exchange of gunfire, Vicki Siscoe was struck by a bullet from her father's weapon and another from a .22-caliber weapon obviously fired by the intruder. The state medical examiner testified that, in his professional opinion, Vicki's death was caused by a large caliber bullet of the same type as a .38-caliber slug exhibited to him. Both appellant, who admitted his presence in the house at the

> time, and W.A. Siscoe were wounded. All three wounded persons were admitted to Baptist Medical Center, where Vicki Siscoe died.
>
> Fingerprints lifted from the .22 caliber pistol were not Johnson's. There was obvious evidence of a forcible entry into the house by the breaking of a window and the removal of a window screen. The ransacking of dresser drawers and the opening of two piggy banks therein were clear indications of larcenous intent of at least one of the intruders. Fingerprints lifted from the windowsill were not Johnson's. (Footnote omitted)

252 Ark. at 1114, 1115.

An evidentiary hearing was held on August 22, 1979, in Pine Bluff, Arkansas. Petitioner was present and testified, as did three other witnesses. Petitioner was represented by Richard Quiggle, appointed by the Court. The respondent was represented by Assistant Attorney General Dennis Molock.

After an initial report with recommended findings and conclusions was submitted to the Hon. William R. Overton, the case was remanded to this magistrate for the consideration of additional evidence.

The testimony at trial established that shortly after petitioner's conviction for murder was reversed by the Arkansas Supreme Court, the Public Defender's office was appointed to represent him in the person of Harold Hall. Mr. Hall was offered a plea proposal by the prosecutor on October 27, 1972, and he communicated the offer to the petitioner the next day, a Saturday. The prosecutor offered petitioner a twenty-one year sentence, to be served concurrently with the twenty-one year sentence he was serving for burglary and assault, in exchange for petitioner's plea of guilty to the charge of accessory after a felony murder. Petitioner accepted the offer and Mr. Hall called the prosecutor on the following Monday and communicated petitioner's ac-

ceptence of the offer. At that time, the prosecutor withdrew his offer saying that a mistake had been made. Mr. Hall then assigned the case to John Achor and told him to tell petitioner that the plea bargain had been withdrawn.

On November 8 and 9, 1972, petitioner appeared in Pulaski County Circuit Court for trial; on November 9, a mistrial was declared and the jury excused. The trial was reset for December 7 and 8 and later continued to February 26, 1973. On February 26, 1973, petitioner entered a plea of guilty to the charge of accessory after a felony murder and was sentenced to twenty-one years to be served after the expiration of the twenty-one years he was then serving for burglary and assault.

The petitioner launches a two-pronged attack on his guilty plea. He contends that although he knew the original offer had been withdrawn, he did not then and does not now understand the difference between the terms consecutive and concurrent and that when he pled guilty he thought that he would receive a sentence of twenty-one years which would "run with" the sentence he was then serving. In essence, he thought he was getting what had been offered him before. He also contends that he pled guilty because Mr. Achor had threatened him with a life sentence if he went to trial and because several important witnesses were not present for the trial.

As to petitioner's first attack on his plea, it is well settled that a guilty plea will be set aside if the defendant who has agreed to the terms of a plea bargain does not receive the benefit of that bargain. *Blackedge v. Allison*, 431 U.S. 63 (1977); *Coney v. Wyrick*, 532 F.2d 94 (8th Cir. 1976). A defendant's mistaken subjective impressions, however, "gained from conferences with his legal counsel, in the absence of substantial objective proof showing that they were reasonably justified, do not provide sufficient grounds upon which to set aside his guilty plea." *U.S. ex rel Curtis v. Zelker*, 466 F.2d 1092 (2nd Cir. 1972), *cert. denied*, 410 U.S.

945 (1973); see *Griffith v. Wyrick*, 527 F.2d 109 (8th Cir. 1975). "The voluntariness of the plea depends on the subjective mind of the petitioner but the resolution of the factual issue most often must be determined by the objective evidence." *Ford v. U.S.*, 418 F.2d 855 (8th Cir. 1969).

The record in this case supports the conclusion that the petitioner was aware of the sentence he would receive and, thus, his alleged mistaken belief was not reasonably justified. Before petitioner's plea was taken, the circuit court judge made the following statement to the prospective jurors in the petitioner's presence: "He's agreed to take twenty-one years on top of the twenty-one he's got which will make a total of forty-two years." Bill of Exceptions, p. 3. The judge later remarked, "As I understand it, what he wants to do is plead guilty and take twenty-one years and this twenty-one year sentence is to commence at the expiration of the sentence he's got in the burglary count." Bill of Exceptions, p. 4. It may be true that the petitioner did not and does not now understand the terms concurrent and consecutive, and did not understand the use of the word "expiration" in the court's second statement. This Court must, however, credit the testimony of Mr. Achor [1] given the state court judge's quoted first statement in the presence of the petitioner. The evidence does not, therefore, convincingly show that the petitioner's alleged mistaken belief was reasonably justified.

In petitioner's second attack on his guilty plea, he argues that the plea was the result of unlawful inducement. He asserts that Mr. Achor threatened him with a life sentence if he went to trial and that he could not proceed to

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Mr. Achor testified that he discussed in detail with petitioner the fact that he was receiving a total of forty-two years and attempted to compare that with the life sentence he believed might result from a trial of the case.

trial because several important witnesses were not present and he, therefore, had no choice but to plead guilty.

When a defendant enters a guilty plea, there must be an affirmative showing on the record that the plea was intelligent and voluntary. *Boykin v. Alabama*, 395 U.S. 238 (1969). A guilty plea is an admission and a waiver of the right to a trial before a judge or jury. "Waivers of constitutional rights not only must be voluntary, but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." *Brady v. U.S.*, 397 U.S. 742 (1970). That the guilty plea was motivated by the fear of the possibility of a heavier sentence does not necessarily prove that "the plea was coerced and invalid as an involuntary act." *Brady*, supra, at 750. The Supreme Court in *Brady*, adopted the following standard from *Shelton v. U.S.*, 242 F.ed 101 (5th Cir.), aff'd., 246 F.2d 571 (1957) (en banc), rev'd on confession of error on other grounds, 356 U.S. 26 (1958):

> A plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, must stand unless induced by threats (or promises to discontinue improper harassment), misrepresentations (including unfulfilled or unfulfillable promises), or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business.

Brady, supra, at 755.

Mr. Achor testified that as a result of his view of the transcript of the first trial and his investigation, he did communicate to the petitioner that he believed if the case went to trial he would be convicted and receive a life sentence. Whether or not the facts surrounding the "threat" of a life sentence by his counsel or the missing witnesses, as discussed later in relation to the issue of ineffective assistance of counsel, or the fact that the

petitioner had shown the willingness to go to trial on three earlier occasions, met the standards required to show a coerced guilty plea, the Court need not decide. The petitioner has placed the Court in an almost impossible situation. Although he has not shown that his alleged mistaken belief that he was to receive a twenty-one year concurrent sentence was reasonable, the Court cannot in the face of that assertion and his testimony rule that he has shown by convincing evidence that his plea was the result of unlawful inducement or coercion. The petitioner and Mr. Achor testified that the twenty-one year concurrent sentence was what the petitioner wanted. The petitioner testified that he thought that was what he received and that he was satisfied until the officials at the prison gave him his time card showing a forty-two year sentence, subsequent to this arrival there. Yet, the petitioner would have the Court reject that testimony totally and find that his plea was coerced. It is sometimes appropriate and necessary for parties to plead alternative theories for relief. However, when a party presents logically inconsistent factual assertions in support of those legal theories, he requires the court, in order to give relief, to reject a complete and logical set of factual assertions in favor of another complete and logical set. This the Court is unwilling to do. Thus, the petitioner's assertions as to his belief concerning the twenty-one year concurrent sentence preclude the finding urged in his coreced plea argument.

The petitioner alleges that he was denied effective assistance of counsel. The standard in the Eighth Circuit in evaluating a petition alleging ineffective assistance of counsel is well established.

> The standard for determining the adequacy of counsel is whether the trial counsel exercised "the customary skills and diligence that a reasonable competent attorney would perform under similar circumstances." *United States v. Easter*, 539 F.2d 663, 666 (8th Cir. 1976), *cert. denied*, 434 U.S. 844 (1977). There is a

> presumption that counsel has rendered effective assistance. *Thomas v. Wyrick*, 535 F.2d 407, 413 (8th Cir.), *cert. denied*, 429 U.S. 868 (1976). To overcome the presumption, appellant must show that: (1) there was a failure to perform an essential duty owned (sic) by the defense attorney to his client, and (2) that the failure prejudiced the defense. *McQueen v. Swenson*, 498 F.2d 207, 218 (8th Cir. 1974).

Dupree v. U.S., 606 F.2d 829, 830 (8th Cir. 1979).

The Court is convinced that Mr. Achor failed to perform an essential duty owed to the petitioner. [2] Although the Court finds that Mr. Achor reviewed the transcript of the previous trial and the subsequent Supreme Court opinion, talked with the petitioner and interviewed the victim's father and the police officer, his failure to attempt to locate and interview Eddie Jackson, [3] Lacey Gordon and Benny Kelly compels this conclusion.

The failure to interview prospective witneses may be a breach of the duty to act as a reasonably competent attorney. *U.S. v. McMillan*, 606 F.2d 245 (8th Cir. 1979); *Morrow v. Parratt*, 574 F.2d 411 (8th Cir. 1978); *Thomas v. Wyrick*, 535 F.2d 407 (8th Cir.), *cert. denied*, 429 U.S. 868 (1976); *McQueen v. Swenson*, 498 F.2d 207 (8th Cir. 1974). Under the circumstances of this case, petitioner's attorney breached that duty. The petitioner was charged by information with murder in the first degree in that he feloniously caused the death off Vicki Siscoe while perpetrating a burglary. The requested but rejected

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2
Although the petitioner alleges other facts to support his ineffective assistance of counsel argument, the court considers those allegations to be without merit.

3
Mr. Achor's testimony was that he did not remember interviewing Jackson.

instruction which resulted in the reversal of petitioner's conviction dealt with the standard under which his responsibility for the acts of his alleged companion, Eddie Jackson, was to be judged. That instruction reads:

> In order that one may be guilty of a homicide, the act must be done by him actually or constructively, and that cannot be unless the crime be committed by his own hands or by the hands of someone acting in concert with him, or in furtherance of a common object or purpose.

Johnson v. State, supra, at 1119.

Although Johnson was identified by the victim's father as the person with whom he exchanged fire, Johnson testified at trial that Eddie Jackson, Lacey Gordon and Benny Kelly accompanied him to the Siscoe's home and that Jackson gained entry through a window and let him in. He stated that "he did not enter the Siscoe house with the intent to commit larceny and did not know that his companion, Jackson, had any intention to do anything there except collect some money due him, until Jackson broke a window to gain entrance". *Johnson v. State*, at 1118. Gordon and Kelly apparently never entered the home. Johnson also testified that Jackson had a gun and he did not.

The testimony of Mr. Earl Evan Harris, III, Chief of Records and Identification for the Arkansas Department of Correction, indicates that Eddie Jackson was an inmate of the Cummins Unit during the period that petitioner's attorney was investigating this case. Although there was no evidence presented as to where Gordon and Kelly were at that time, petitioner's attorney made no attempt to locate and interview them. These potential witnesses were crucial in any attempt to find evidence supporting the petitioner. Thus, the petitioner has established the breach required in the first steps of the Court's analysis.

Two hearings have been held since the remand from Judge Overton. Evidence was presented on the issue of prejudice to the petitioner as a result of the breach of duty found by the court. In supplemental hearings it was established that Eddie Jackson was unavailable for the initial hearing in this court and remains unavailable because of an outstanding warrant for his arrest for parole violation.

Petitioner testified that on the night of the incident which led to his guilty plea, Benny Kelly, driving Eddie Jackson's car, "dropped Lacey Gordon off" before they proceeded to the Siscoe home. The purpose of going to the Siscoe home was to collect money that Mr. Siscoe owed Jackson.

Lacey Gordon testified that he had known Benny Kelly and George Johnson all of his life and he had met Eddie Jackson a couple of times. Lacey Gordon, however, remembered no involvement with George Johnson, Benny Kelly or Eddie Jackson on the night of the shooting. He did not remember ever riding in a car with all three of them on any occasion. He heard about the indictment "on the street" and was never contacted to testify in George Johnson's trial. The petitioner's attorney offered as evidence notes taken by him of his telephone interview with Gordon before the supplemental hearings. These notes were intended to show that Gordon's testimony differed from the statement given petitioner's attorney. Although the notes present a hearsay problem, if for impeachment purposes petitioner's counsel withdrew from the case and the notes were admitted under the business recor d exception or if for the same purpose the petitioner's attorney after withdrawing testified concerning his conversation with Gordon, petitioner's cause would not be advanced. Such testimony would not allow a conclusion that it was available at the time of petitioner's state court trial and thus prejudice could not be shown in this manner. The credibility of the witness is simply destroyed and no basis is left for finding that testimony helpful to the petitioner was available. In

addition, Benny Kelly also testified that he had no knowledge of the Siscoe incident except from talk "on the street." The petitioner argues, however, that the denials of Kelly, Gordon and without doubt Jackson would have advanced the petitioner's case.

> He could have testified as he did, called these three to deny any involvement, or more likely to take the "Fifth" and his counsel could have argued to the jury that these denials, or non-responses, clearly showed their involvement.
>
> The argument may have been unsuccessful, but there is no requirement that petitioner show the potential success of his defense. He need only show that the evidence might have been helpful. *McQueen, supra.*

Petitioner's Burden of Proof Memorandum, p. 4.

The standard in *McQueen* is that the evidence *would* have proved helpful. This the Court does not find. Although,

> where the defendant enters a guilty plea, the issue of prejudice necessarily centers upon whether the attorney's failure to completely investigate any material facts prejudice the defendant's ability to make an intelligent and voluntary plea of guilty.

Ford v. Parratt, 638 F.2d 1115, 1118 (8th Cir. 1981), this Court does not find that the denial of involvement or knowledge of the incident by Gordon and Kelly would have affected the petitioner's decision to plead guilty.

Thus, petitioner is left with the argument that the unavailability of George (sic) Jackson is a changed circumstance beyond his control which shifts the burden to the state of showing the absence of prejudice. *McQueen v. Swenson*, 498 F.2d 207, 220 (7th Cir. 1974). A literal reading of *McQueen* would require finding that the burden has shifted to the state. Here, however, the *McQueen* holding

does not apply. Both counsel assert and the court agrees that it would be unreasonable to assume that Jackson's testimony would differ from that of Gordon and Kelly. Although Jackson's actual testimony is unavailable because of circumstances beyond the control of the petitioner the testimony itself would not aid the petitioner. This may be a unique circumstance where the burden-shifting doctrine of *McQueen*, if applied, would place the petitioner in a better position than if the witness were able to testify in this habeas proceeding. That is a result which this Court does not believe the *McQueen* Court intended.

The petitioner has not shown, therefore, that he was prejudiced by the failure of his counsel to interview the three witnesses. He has made no showing that the testimony of Jackson, Gordon or Kelly would have supported his position, and for the Court to assume that fact and thus to assume prejudice would be error. See, *U.S. v. Davis*, No. 79-1758 (8th Cir. Feb. 17, 1980).

The petitioner raised an additional constitutional challenge after the initial hearing in this matter. It is undisputed that the prosecutor communicated an offer of a twenty-one year sentence, to run concurrent with the twenty-one year sentence petitioner was serving for burglary and assault in exchange for a plea of guilty to a reduced charge of accessory after a felony murder. It is also undisputed that this offer was communicated to and accepted by the petitioner, and that the offer was subsequently withdrawn by the prosecutor for the apparent reason that a mistake had been made. The petitioner argues that the withdrawal of the offer after acceptance violated his constitutional rights and that he has a constitutional right to the enforcement of that bargain.

The respondent argues that the petitioner has failed to exhaust this ground and thus the Court should not address the issue. Although the petitioner did seek post-conviction relief pursuant to Rule 37 of the Arkansas Rules of Criminal Procedure, he did not raise this issue.

Rule 37.2 (b) states:

> All grounds for relief available to a prisoner under this rule must be raised in his original or amended petition. Any grounds not so raised or any grounds finally adjudicated or intelligently and understandingly waived in the proceedings which resulted in the conviction or sentence or in any other proceedings that the prisoner may have taken to secure relief from his conviction or sentence may not be the basis for a subsequent petition.

The Arkansas Supreme Court has held that a petitioner is not entitled to file a second petition for relief. *Winberry v. Ark.*, 265 Ark. 65 (1974). *See also, Witham v. Mabry*, 596 F.2d 293 (8th Cir. 1979).

There is no indication that the Arkansas Supreme Court would consider a second petition under Rule 37. The petitioner, thus, has exhausted his remedies.

Although the issue of the withdrawn offer was not raised until after the hearing, the facts are not disputed and the Court will address the issue on its merits. Since the Supreme Court decided *Santobello v. New York*, 404 U.S. 257 (1971), fairness in the plea bargaining process has been viewed as having constitutional dimensions. In almost all decisions, however, the right of the defendant to enforce a plea bargain has been limited to situations in which the defendant has entered his plea of guilty. The petitioner here asserts that the withdrawal of the offer after only his acceptance is fundamentally unfair and requies enforcement by the Court of the bargain. [4]

---

[4] The petitioner also asserts that the failure of his counsel to attempt to enforce the plea bargain in Court deprived him of effective assistance of counsel. The Court finds this assertion to be without merit.

In *Cooper v. United States*, 594 F.2d 12, 18 (4th Cir. 1979), the Court found a right to enforcement of plea bargains before entering a guilty plea " . . . under appropriate circumstances . . . and on the basis alone of expectations reasonably formed in reliance upon the honor of the government in making and abiding by its proposals." The sources of the constitutional rights found by the Fourth Circuit are the rights to fundamental fairness embraced within substantive due process guarantees and the right to effective assistance of counsel.

In explaining the application of the right to effective assistance of counsel in the context of a withdrawn offer by government, the court stated:

> To the extent that the government attempts through defendant's counsel to change or retract positions earlier communicated, a defendant's confidence in his counsel's capability and professional responsibility, as well as in the government's reliability are necessarily jeopardized and the effectiveness of counsel's assistance easliy compromised. At the very least, these Sixth Amendment considerations add a heightened degree of obligation to the government's fundamental duty to negotiate with scrupulous fairness in seeking guilty pleas. Footnote omitted.

Cooper at 18, 19.

The elements crucial to the Cooper court's holding were the specific and unambiguous form of the government's proposal; the reasonable context of the proposal in specific context; the apparent or actual authority of the prosecutor at the time; the prompt communication to the defendant; the prompt and unequivocal assent by the defendant; the prompt communication of acceptance to the government; and the lack of extenuating circumstances affecting the government's or any public interest unknown when the proposal was extended.

In *Virgin Islands v. Scotland*, No. 79-1188 (3rd Cir. Feb. 1980), the Third Circuit declined to follow the *Cooper* rationale. Although it found that Cooper was so factually similar to *Scotland* that alleged distinctions were spurious, the Third Circuit rejected both the Sixth Amendment and due process findings of the Fourth Circuit. As to effective assistance of counsel, the Third Circuit after noting the court in *Cooper* observed that the prosecutor made the offer without any attached condition, reasoned:

> It reasonable to extrapolate that defense counsel could have a duty to inform his client that an offered proposal is conditional if the prosecutor had so informed him. Thus, according to the *Cooper* rationale, defendant's knowledge of such a contingency would remedy the ineffective assistance of counsel claim. As a practical matter it may be presumed that the government in the Fourth Circuit will make only conditional offers to defendants. If this type of "conditional" offer was not alone sufficient under the *Cooper* holding, the next logical step would be for a court to inquire as to whether the condition that the prosecutor cites is a legitimate one or one simply to avoid the holding of *Cooper*. Given the established breadth of prosecutorial discretion at all stages of the criminal process, particularly in charging and plea negotiation, see *Bordenkircher v. Hayes*, 434 U.S. 357 (1978), this type of inquiry would appear to be an invasion of that discretion. Although *Cooper* does not go that far, it does invade the province of the United States Attorney and there is potential for further questionable concrete invasions.

Scotland, supra, slip op. at 6, note 6.

> In addressing the due process issue, the Third Circuit found:
>
> **Although the contentions concerning prosecutorial discretion and the discouragement of pleas are persuasive, the availability of an alternative remedy for the defendant is the convincing factor for rejecting the *Cooper* rule.**

> If the defendant is not allowed to compel specific performance of a plea proposal, he may withdraw his tendered plea or refuse to consent to any new bargain proposed by the prosecutor. It may be argued that this "remedy" is insufficien t, particularly in cases where, as here, the government's acts were far from exemplary. However, the defendant is then entitled to his constitutional right to trial by jury. This fundamental right would be belittled if we held it to be an insufficient "remedy" or result for a defendant who has not been induced to rely on the plea to his detriment. The prosecutor is under no duty to plea bargain—if no offer is made, the defendant is entitled to a trial. There is no rational basis for holding, in essence, that a trial is sufficient for the defendant who has not been offered a plea and insufficient for the one who has. The courts cannot compel the prosecutor to offer a plea bargain to eliminate the resulting discrimination between these two types of defendants. There is no rule that dictates that the prosecutor may not simply let a case go to trial. In the case sub judice, Springette is in the same position as if he had not been offered a plea because no detrimental reliance is alleged. Thus we reject a *Cooper*-type rule that would allow specific performance of an unconsummated plea in the absence of such detrimental reliance because a jury trial on the charge is an adequate remedy.
>
> When, however, the defendant detrimentally relies on the government's promise, the resulting harm from this induced reliance implicates due process guarantees. This basic estoppel principle was recognized by the Court in *Santobello*, when a defendant pleads guilty in reliance on an agreement with the prosecutor, that promise must be fulfilled. *Santobello* arguably could be extended to cover the situation where the defendant has not yet entered the plea but has relied on the bargain in such a way that a fair trial would no longer be possible. There is no claim in this case of such reliance. Absent such reliance, we do not find the *Cooper* rule compelling. (Footnote omitted)

Scotland, supra, slip op. at 9.

The case sub judice is also factually similar to *Cooper* and the rationale used by the Fourth Circuit would apply. This Court, however, agrees with the compelling reasoning of the Third Circuit in *Scotland.*

THEREFORE, IT IS ORDERED that this petition be, and it is hereby dismissed with prejudice.

IT IS SO ORDERED this 27th day of August.

/s/ Henry L. Jones, Jr.
United States Magistrate

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NO. 81-2181-EA	) September Term 1982
George Johnson,	)
Appellant,	)
	) Appeal from the
vs.	) United States District
	) Court for the Eastern
James Mabry, Commissioner,	) District of Arkansas
Arkansas Department of	)
Correction,	)
	)
Appellee.	)
	)
	)

The Court, having considered appellee's petition for rehearing and suggestions for rehearing en banc and being now fully advised in the premises, hereby orders the petition for rehearing and suggestions for rehearing en banc denied. Judges Ross, John R. Gibson and Fagg would grant the petition for rehearing en banc.

June 30, 1983

CERTIFICATE OF SERVICE

I, Dennis R. Molock, hereby certify that a copy of the foregoing Supplemental Appendix has been served upon the respondent herein by placing a copy of the same in the U.S. Mail, postage paid, addressed to Richard Quiggle, Attorney at Law, 904 West Second St., P.O. Box 2651, Little Rock, Arkansas this 22nd day of September, 1983.

/s/ DENNIS R. MOLOCK

Office - Supreme Court, U.S.
FILED
JAN 30 1984
ALEXANDER L. STEVAS,
CLERK

In the

Supreme Court of the United States

October Term, 1983

No. 83-328

James Mabry, Commissioner, Arkansas Department of Correction ..... *Petitioner*

V.

George Johnson ..... *Respondent*

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI
FILED AUGUST 29, 1983
CERTIORARI GRANTED DECEMBER 12, 1983

JOINT APPENDIX

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 29, 1983
CERTIORARI GRANTED DECEMBER 12, 1983

JOINT APPENDIX

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

August 21, 1978 – Petition for writ of habeas corpus filed.

Sept. 11, 1978 – Response to petition for writ of habeas corpus filed.

Aug. 16, 1979 – Petitioner's motion to amend filed.

Aug. 22, 1979 – Respondent enters oral denial of allegations made in amended petition at hearing before United States Magistrate.

Aug. 22, 1979 – Hearing on petitioner's amended petition for writ of habeas corpus.

March 24, 1980 – Recommended disposition by United States Magistrate.

June 24, 1980 – Order of United States District Court remanding cause for further hearing filed.

Oct. 21, 1980 – Supplemental hearing to admit testimony of Lacy Gordon.

Aug. 28, 1981 – Report with recommended findings and conclusions of United States Magistrate.

Sept. 17, 1981 – Order of United States District Court adopting Magistrate's findings and conclusions filed.

Sept. 17, 1981 – Judgment of United States District Court filed.

June 17, 1982 – Stipulation of testimony of Benny Kelley given in open court December 11, 1980.

May 6, 1983 – Opinion of the Court of Appeals for the Eighth Circuit filed.

May 31, 1983 – Petition for Rehearing En Banc filed.

June 30, 1983 – Order of the Court of Appeals for the Eighth Circuit denying Mabry's petition for rehearing en banc filed.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

GEORGE JOHNSON PETITIONER

VS. NO. PB-C-78-139

JAMES MABRY, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION RESPONDENT

****

BEFORE HONORABLE HENRY L. JONES, JR., UNITED STATES MAGISTRATE, IN PINE BLUFF, ARKANSAS, ON AUGUST 22, 1979

****

APPEARANCES:

On Behalf of the Petitioner:

RICHARD QUIGGLE, Esq.
1100 Worthen Bank Building
Little Rock, Arkansas 72201

On Behalf of the Respondent:

DENNIS MOLOCK, Esq.
Office of the Attorney General
Justice Building
State Capitol Grounds
Little Rock, Arkansas 72201

[The following occurred during these proceedings].

(Recess)

• • •

MR. QUIGGLE: Your Honor, during the recess the State and I have agreed that we can stipulate to certain dates that are important in the history of Mr. Johnson's legal activities.

I would like at this time to read the stipulation of the dates and occurrences into the record.

THE COURT: All right.

MR. QUIGGLE: 11-23-1970, Mr. Johnson was found guilty and sentenced to life imprisonment. 6-15-71, he was convicted of assault with intent to kill and burglary. He received a twenty-one and a twelve year sentence, the sentences to run concurrent.

8-7-72, the murder case was reversed. 8-21-72, Jim Howard appeared for arraignment. 10-6-72, Jim Howard relieved, Harold Hall, Public Defender, appointed to represent Mr. Johnson.

10-31-72, a pen order was filed for Johnson for a plea date. 11-8-72, there were two events: a motion to pay Jim.

[T. 33]

MR. QUIGGLE: (Continuing) Howard a fee, and secondly, a jury was impaneled, evidence received on behalf of State, recess at 4:45 p.m.

11-9-72, two events: Court reconvenes, mistrial declared, Howard awarded fees. 11-15-72, trial reset for December 7th and 8, 1972. December 4, 1972, trial continued to February 26, 1972.

February 26, 1973, guilty plea entered. Twenty-one years to run consecutively; that is, to commence at the expiration of sentence now serving.

7-14-1977, Mr. Johnson's Rule 37 hearing was held, and on 6-5-78 the Arkansas Supreme Court affirms the denial of the Rule 37 petition.

THE COURT: Mr. Molock, is that stipulation agreeable?

MR. MOLOCK: Yes, Your Honor, it is.

THE COURT: That will be accepted.

[T. 34]

* * *

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

GEORGE JOHNSON PETITIONER

VS. CASE NO. PB-C-78-139

JAMES MABRY, Director, Arkansas Department of Correction RESPONDENT

JUDGMENT

Pursuant to the Order entered this date, it is Adjudged that the petitioner's petition for a writ of habeas corpus be, and it is hereby, dismissed.

DATED this 16th day of September, 1980.

/s/ William R. Overton
United States District Judge

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

GEORGE JOHNSON PETITIONER

VS. CASE NO. PB-C-78-139

JAMES MABRY, Director, Arkansas
Department of Correction RESPONDENT

ORDER

The Court has received a Report with Recommended Findings and Conclusions from Magistrate Henry L. Jones, Jr. After careful review of those Findings and Conclusions, the Court adopts them in their entirety.

THEREFORE, IT IS ORDERED that the petitioner's petition for a writ of Habeas Corpus is dismissed.

IT IS SO ORDERED this 16th day of September, 1980.

/s/ William R. Overton
United States District Judge

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

GEORGE JOHNSON PETITIONER

VS. CASE NO. PB-C-78-139

JAMES MABRY, Director, Arkansas
Department of Correction RESPONDENT

REPORT WITH RECOMMENDED FINDINGS AND CONCLUSIONS

The petitioner, an inmate of the Arkansas Department of Correction, was convicted by a jury on November 23, 1970, of murder in the first degree and was sentenced to a term of life imprisonment. On June 15, 1971, he was found guilty of burglary and assault with intent to kill and sentenced to twenty-one years. These charges arose from the same incident for which petitioner received the life sentence. Petitioner's conviction of first degree murder was subsequently reversed by the Arkansas Supreme Court due to the trial court's failure to give a requested jury instruction. *Johnson v. State*, 252 Ark. 1113 (1972). On February 26, 1973, petitioner entered a plea of guilty to the charge of accessory after a felony murder and was sentenced to a term of twenty-one years, to run consecutively to the twenty-one year sentence he was serving for burglary and assault with intent to kill.

Petitioner sought post-conviction relief pursuant to Rule 37 of the Arkansas Rules of Criminal Procedure alleging ineffective assistance of counsel and coerced guilty plea. The Pulaski County Circuit Court denied petitioner's request for post-conviction relief and, in an unpublished opinion, the Arkansas Supreme Court affirmed on June 5, 1978. He then filed a petition for a writ of habeas corpus under 28 U.S.C. §2554.

Petitioner alleges that his confinement is unconstitutional for two reasons:

> (1) His plea of guilty was unlawfully induced and not made voluntarily, since he did not understand the nature and consequence of the plea and accepted the offer of twenty-one years only after being threatened by counsel; and
>
> (2) He was denied effective assistance of counsel in that his appointed counsel only talked with him for ten

> minutes, did not explain the nature and consequences of a plea of guilty, did not interview any witnesses, and did not discuss his version of the facts with him.

The respondent admits that the petitioner has exhausted his state remedies as to these grounds as required by 28 U.S.C. §2254(b).

In that this is a habeas corpus proceedings, the findings of the state trial court are presumptively correct unless (1) the merits of the factual dispute were not resolved in the state court hearing; (2) the fact finding procedure employed by the state court was not adequate to afford a full and fair hearing; (3) the material facts were not adequately developed at the state court hearing; (4) the state court lacked jurisdiction of the subject matter or over the person of the applicant in the state court proceeding; (5) the applicant was an indigent and the state court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the state court proceeding; (6) the applicant did not receive a full, fair, and adequate hearing in the state court proceeding; (7) the applicant was otherwise denied due process of law in the state court proceeding; (8) or unless, on the record as a whole, the federal court concludes that the factual determination by the state court is not fairly supported by the record. 28 U.S.C. §2554(d).

Here the presumption applies because the record reveals that none of the above circumstances exist. In a case where the district court had granted habeas relief, the Eighth Circuit made the following comments:

> **The federal district court in fact relied upon the exact testimony taken in the state proceeding. The federal district judge made no finding that the 1952 state court factual determination was *not* supported by the record. Under these circumstances, "the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the state court was erroneous." *See* §2254(d).**

In Re Parker, 423 F.2d 1021 (8th Cir.); *cert. denied*, 398 U.S. 966 (1970).

The following review of the facts by the Arkansas Supreme Court in its reversal of Johnson's conviction, sets the background for the issues addressed herein.

> Mr. and Mrs. W.A. Siscoe and their daughter Vicki arrived home from the Siscoe grocery store on the night of May 22, 1970, at about 10:45 p.m. Mrs. Siscoe drove her vehicle into the driveway, parked it and awaited her daughter and husband, who followed her in a vehicle driven by the husband. He stopped his car and the daughter got out, opened the front door and entered the Siscoe dwelling. Her father heard her screaming inside the house and ran inside, armed with a .38-caliber revolver, where he became aware of the presence of an intruder who threatened to kill him and began firing a weapon. When Siscoe returned the fire, the intruder grabbed Vicki, swung her around as a body shield and a scuffle ensued during which Siscoe fired, or attempted to fire over the intruder's shoulder. Shots were fired by the father and by at least one intruder. In the exchange of gunfire, Vicki Siscoe was struck by a bullet from her father's weapon and another from a .22-caliber weapon obviously fired by the intruder. The state medical examiner testified that, in his professional opinion, Vicki's death was caused by a large caliber bullet of the same type as a .38-caliber slug exhibited to him. Both appellant, who admitted his presence in the house at the time, and W.A. Siscoe were wounded. All three wounded persons were admitted to Baptist Medical Center, where Vicki Siscoe died.
>
> Fingerprints lifted from the .22-caliber pistol were not Johnson's. There was obvious evidence of a forcible entry into the house by the breaking of a window and the removal of a window screen. The ransacking of dresser drawers and the opening of two piggy banks therein were clear indications of larcenous intent of at least one of the intruders. Fingerprints lifted from the windowsill were not Johnson's. (Footnote omitted)

252 Ark. at 1114, 1115.

An evidentiary hearing was held on August 22, 1979, in Pine Bluff, Arkansas. Petitioner was present and testified, as did three other witnesses. Petitioner was represented by Richard Quiggle, appointed by the Court. The respondent was represented by Assistant Attorney General Dennis Molock.

After an initial report with recommended findings and conclusions was submitted to the Hon. William R. Overton, the case was remanded to this magistrate for the consideration of additional evidence.

The testimony at trial established that shortly after petitioner's conviction of murder was reversed by the Arkansas Supreme Court, the Public Defender's office was appointed to represent him in the person of Harold Hall. Mr. Hall was offered a plea proposal by the prosecutor on October 27, 1972, and he communicated the offer to the petitioner the next day, a Saturday. The prosecutor offered petitioner a twenty-one year sentence, to be served concurrently with the twenty-one year sentence he was serving for burglary and assault, in exchange for petitioner's plea of guilty to the charge of accessory after a felony murder. Petitioner accepted the offer and Mr. Hall called the prosecutor on the following Monday and communicated petitioner's acceptance of the offer. At that time, the prosecutor withdrew his offer saying that a mistake had been made. Mr. Hall then assigned the case to John Achor and told him to tell petitioner that the plea bargain had been withdrawn.

On November 8 and 9, 1972, petitioner appeared in Pulaski County Circuit Court for trial; on November 9, a mistrial was declared and the jury excused. The trial was reset for December 7 and 8 and later continued to February 26, 1973. On February 26, 1973, petitioner entered a plea of guilty to the charge of accessory after a felony murder and was sentenced to twenty-one years to be served after the

expiration of the twenty-one years he was then serving for burglary and assault.

The petitioner launches a two-pronged attack on his guilty plea. He contends that although he knew the original offer had been withdrawn, he did not then and does not now understand the difference between the terms consecutive and concurrent and that when he pled guilty he thought that he would receive a sentence of twenty-one years which would "run with" the sentence he was then serving. In essence, he thought he was getting what had been offered him before. He also contends that he pled guilty because Mr. Achor had threatened him with a life sentence if he went to trial and because several important witnesses were not present for the trial.

As to petitioner's first attack on his plea, it is well settled that a guilty plea will be set aside if the defendant who has agreed to the terms of a plea bargain does not receive the benefit of that bargain. *Blackledge v. Allison*, 431 U.S. 63 (1977); *Coney v. Wyrick*, 532 F.2d 94 (8th Cir. 1976). A defendant's mistaken subjective impressions, however, "gained from conferences with his legal counsel, in the absence of substantial objective proof showing that they were reasonably justified, do not provide sufficient grounds upon which to set aside his guilty plea." *U.S. ex rel Curtis v. Zelker*, 466 F.2d 1092 (2nd Cir. 1972), *cert. denied*, 410 U.S. 945 (1973); see *Griffith v. Wyrick*, 527 F.2d 109 (8th Cir. 1975). "The voluntariness of the plea depends on the subjective mind of the petitioner but the resolution of the factual issue most often must be determined by the objective evidence." *Ford v. U.S.*, 418 F.2d 855 (8th Cir. 1969).

The record in this case supports the conclusion that the petitioner was aware of the sentence he would receive and, thus, his alleged mistaken belief was not reasonably justified. Before petitioner's plea was taken, the circuit court judge made the following statement to the prospective jurors in the petitioner's presence: "He's agreed to take

twenty-one years on top of the twenty-one he's got which will make a total of forty-two years." Bill of Exceptions, p. 3. The judge later remarked, "As I understand it, what he wants to do is plead guilty and take twenty-one years and this twenty-one year sentence is to commence at the expiration of the sentence he's got in the burglary count." Bill of Exceptions, p. 4. It may be true that the petitioner did not and does not now understand the terms concurrent and consecutive, and did not understand the use of the word "expiration" in the court's second statement. This Court must, however, credit the testimony of Mr. Achor [1] given the state court judge's quoted first statement in the presence of the petitioner. The evidence does not, therefore, convincingly show that the petitioner's alleged mistaken belief was reasonably justified.

In petitioner's second attack on his guilty plea, he argues that the plea was the result of unlawful inducement. He asserts that Mr. Achor threatened him with a life sentence if he went to trial and that he could not proceed to trial because several important witnesses were not present and he, therefore, had no choice but to plead guilty.

When a defendant enters a guilty plea, there must be an affirmative showing on the record that the plea was intelligent and voluntary. *Boykin v. Alabama*, 395 U.S. 238 (1969). A guilty plea is an admission and a waiver of the right to a trial before a judge or jury. "Waivers of constitutional rights not only must be voluntary, but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." *Brady v. U.S.*, 397 U.S. 742 (1970). That the guilty plea was motivated by the fear of the possibility of a heavier sentence does not necessarily prove that "the plea was

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[1] Mr. Achor testified that he discussed in detail with petitioner the fact that he was receiving a total of forty-two years and attempted to compare that with the life sentence he believed might result from a trial of the case.

coerced and invalid as an involuntary act." *Brady*, supra, at 750. The Supreme Court in *Brady*, adopted the following standard from *Shelton v. U.S.*, 242 F.2d 101 (5th Cir.), aff'd., 246 F.2d 571 (1957) (en banc), rev'd on confession of error on other grounds, 356 U.S. 26 (1958):

> A plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, must stand unless induced by threats (or promises to discontinue improper harassment), misrepresentations (including unfulfilled or unfulfillable promises), or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business.

Brady, supra, at 755.

Mr. Achor testified that as a result of his view of the transcript of the first trial and his investigation, he did communicate to the petitioner that he believed if the case went to trial he would be convicted and receive a life sentence. Whether or not the facts surrounding the "threat" of a life sentence by his counsel or the missing witnesses, as discussed later in relation to the issue of ineffective assistance of counsel, or the fact that the petitioner had shown the willingness to go to trial on three earlier occasions, met the standards required to show a coerced guilty plea, the Court need not decide. The petitioner has placed the Court in an almost impossible situation. Although he has not shown that his alleged mistaken belief that he was to receive a twenty-one year concurrent sentence was reasonable, the Court cannot in the face of that assertion and his testimony rule that he has shown by convincing evidence that his plea was the result of unlawful inducement or coercion. The petitioner and Mr. Achor testified that the twenty-one year concurrent sentence was what the petitioner wanted. The petitioner testified that he thought that was what he received and that he was satisfied until the officials at the prison gave him his time card showing a forty-two year sentence,

subsequent to this arrival there. Yet, the petitioner would have the Court reject that testimony totally and find that his plea was coerced. It is sometimes appropriate and necessary for parties to plead alternative theories for relief. However, when a party presents logically inconsistent factual assertions in support of those legal theories, he requires the court, in order to give relief, to reject a complete and logical set of factual assertions in favor of another complete and logical set. This the Court is unwilling to do. Thus, the petitioner's assertions as to his belief concerning the twenty-one year concurrent sentence preclude the finding urged in his coerced plea argument.

The petitioner alleges that he was denied effective assistance of counsel. The standard in the Eighth Circuit in evaluating a petition alleging ineffective assistance of counsel is well established.

> The standard for determining the adequacy of counsel is whether the trial counsel exercised "the customary skills and diligence that a reasonable competent attorney would perform under similar circumstances." *United States v. Easter*, 539 F.2d 663, 666 (8th Cir. 1976), *cert. denied*, 434 U.S. 844 (1977). There is a presumption that counsel has rendered effective assistance. *Thomas v. Wyrick*, 535 F.2d 407, 413 (8th Cir.), *cert. denied*, 429 U.S. 868 (1976). To overcome the presumption, appellant must show that: (1) there was a failure to perform an essential duty owned (sic) by the defense attorney to his client, and (2) that the failure prejudiced the defense. *McQueen v. Swenson*, 498 F.2d 207, 218 (8th Cir. 1974).

Dupree v. U.S., 606 F.2d 829, 830 (8th Cir. 1979).

The Court is convinced that Mr. Achor failed to perform an essential duty owed to the petitioner.[2] Although

[2]Although the petitioner alleges other facts to support his ineffective assistance of counsel argument, the court considers those allegations to be without merit.

the Court finds that Mr. Achor reviewed the transcript of the previous trial and the subsequent Supreme Court opinion, talked with the petitioner and interviewed the victim's father and the police officer, his failure to attempt to locate and interview Eddie Jackson,[3] Lacey Gordon and Benny Kelly compels this conclusion.

The failure to interview prospective witnesses may be a breach of the duty to act as a reasonably competent attorney. *U.S. v. McMillan*, 606 F.2d 245 (8th Cir. 1979); *Morrow v. Parratt*, 574 F.2d 411 (8th Cir. 1978); *Thomas v. Wyrick*, 535 F.2d 407 (8th Cir.), *cert. denied*, 429 U.S. 868 (1976); *McQueen v. Swenson*, 498 F.2d 207 (8th Cir. 1974). Under the circumstances of this case, petitioner's attorney breached that duty. The petitioner was charged by information with murder in the first degree in that he feloniously caused the death of Vicki Siscoe while perpetrating a burglary. The requested but rejected instruction which resulted in the reversal of petitioner's conviction dealt with the standard under which his responsibility for the acts of his alleged companion, Eddie Jackson, was to be judged. That instruction reads:

> In order that one may be guilty of a homicide, the act must be done by him actually or constructively, and that cannot be unless the crime be committed by his own hands or by the hands of someone acting in concert with him, or in furtherance of a common object or purpose.

Johnson v. State, supra, at 1119.

Although Johnson was identified by the victim's father as the person with whom he exchanged fire, Johnson testified at trial that Eddie Jackson, Lacey Gordon and Benny Kelly accompanied him to the Siscoe's home and that

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[3]Mr. Achor's testimony was that he did not remember interviewing Jackson.

Jackson gained entry through a window and let him in. He stated that "he did not enter the Siscoe house with the intent to commit larceny and did not know that his companion, Jackson, had any intention to do anything there except collect some money due him, until Jackson broke a window to gain entrance." *Johnson v. State*, at 1118. Gordon and Kelly apparently never entered the home. Johnson also testified that Jackson had a gun and he did not.

The testimony of Mr. Earl Evan Harris, III, Chief of Records and Identification for the Arkansas Department of Correction, indicates that Eddie Jackson was an inmate of the Cummins Unit during the period that petitioner's attorney was investigating this case. Although there was no evidence presented as to where Gordon and Kelly were at that time, petitioner's attorney made no attempt to locate and interview them. These potential witnesses were crucial in any attempt to find evidence supporting the petitioner. Thus, the petitioner has established the breach required in the first steps of the Court's analysis.

Two hearings have been held since the remand from Judge Overton. Evidence was presented on the issue of prejudice to the petitioner as a result of the breach of duty found by the court. In supplemental hearings it was established that Eddie Jackson was unavailable for the initial hearing in this court and remains unavailable because of an outstanding warrant for his arrest for parole violation.

Petitioner testified that on the night of the incident which led to his guilty plea, Benny Kelly, driving Eddie Jackson's car, "dropped Lacey Gordon off" before they proceeded to the Siscoe home. The purpose of going to the Siscoe home was to collect money that Mr. Siscoe owed Jackson.

Lacey Gordon testified that he had known Benny Kelly and George Johnson all of his life and he had met Eddie Jackson a couple of times. Lacey Gordon, however,

remembered no involvement with George Johnson, Benny Kelly or Eddie Jackson on the night of the shooting. He did not remember ever riding in a car with all three of them on any occasion. He heard about the indictment "on the street" and was never contacted to testify in George Johnson's trial. The petitioner's attorney offered as evidence notes taken by him of his telephone interview with Gordon before the supplemental hearings. These notes were intended to show that Gordon's testimony differed from the statement given petitioner's attorney. Although the notes present a hearsay problem, if for impeachment purposes petitioner's counsel withdrew from the case and the notes were admitted under the business record exception or if for the same purpose the petitioner's attorney after withdrawing testified concerning his conversation with Gordon, petitioner's cause would not be advanced. Such testimony would not allow a conclusion that it was available at the time of petitioner's state court trial and thus prejudice could not be shown in this manner. The credibility of the witness is simply destroyed and no basis is left for finding that testimony helpful to the petitioner was available. In addition, Benny Kelly also testified that he had no knowledge of the Siscoe incident except from talk "on the street." The petitioner argues, however, that the denials of Kelly, Gordon and without doubt Jackson would have advanced the petitioner's case.

> He could have testified as he did, called these three to deny any involvement, or more likely to take the "Fifth" and his counsel could have argued to the jury that these denials, or non-responses, clearly showed their involvement.
>
> The argument may have been unsuccessful, but there is no requirement that petitioner show the potential success of his defense. He need only show that the evidence might have been helpful. *McQueen, supra.*

Petitioner's Burden of Proof Memorandum, p. 4.

The standard in *McQueen* is that the evidence *would* have proved helpful. This the Court does not find. Although,

> where the defendant enters a guilty plea, the issue of prejudice necessarily centers upon whether the attorney's failure to completely investigate any material facts prejudice the defendant's ability to make an intelligent and voluntary plea of guilty.

Ford v. Parratt, 638 F.2d 1115, 1118 (8th Cir. 1981), this Court does not find that the denial of involvement or knowledge of the incident by Gordon and Kelly would have affected the petitioner's decision to plead guilty.

Thus, petitioner is left with the argument that the unavailability of George (sic) Jackson is a changed circumstance beyond his control which shifts the burden to the state of showing the absence of prejudice. *McQueen v. Swenson*, 498 F.2d 207, 220 (7th Cir. 1974). A literal reading of *McQueen* would require finding that the burden has shifted to the state. Here, however, the *McQueen* holding does not apply. Both counsel assert and the court agrees that it would be unreasonable to assume that Jackson's testimony would differ from that of Gordon and Kelly. Although Jackson's actual testimony is unavailable because of circumstances beyond the control of the petitioner the testimony itself would not aid the petitioner. This may be a unique circumstance where the burden-shifting doctrine of *McQueen*, if applied, would place the petitioner in a better position than if the witness were able to testify in this habeas proceeding. That is a result which this Court does not believe the *McQueen* Court intended.

The petitioner has now [sic] shown, therefore, that he was prejudiced by the failure of his counsel to interview the three witnesses. He has made no showing that the testimony of Jackson, Gordon or Kelly would have supported his position, and for the Court to assume that fact and thus to assume prejudice would be error. See, *U.S. v. Davis*, No. 79-1758 (8th Cir. Feb. 17, 1980).

The petitioner raised an additional constitutional challenge after the initial hearing in this matter. It is undisputed that the prosecutor communicated an offer of a twenty-one year sentence, to run concurrent with the twenty-one year sentence petitioner was serving for burglary and assault in exchange for a plea of guilty to a reduced charge of accessory after a felony murder. It is also undisputed that this offer was communicated to and accepted by the petitioner, and that the offer was subsequently withdrawn by the prosecutor for the apparent reason that a mistake had been made. The petitioner argues that the withdrawal of the offer after acceptance violated his constitutional rights and that he has a constitutional right to the enforcement of that bargain.

The respondent argues that the petitioner has failed to exhaust this ground and thus the Court should not address the issue. Although the petitioner did seek post-conviction relief pursuant to Rule 37 of the Arkansas Rules of Criminal Procedure, he did not raise this issue.

Rule 37.2 (b) states:

> All grounds for relief available to a prisoner under this rule must be raised in his original or amended petition. Any grounds not so raised or any grounds finally adjudicated or intelligently and understandingly waived in the proceedings which resulted in the conviction or sentence or in any other proceedings that the prisoner may have taken to secure relief from his conviction or sentence may not be the basis for a subsequent petition.

The Arkansas Supreme Court has held that a petitioner is not entitled to file a second petition for relief. *Winberry v. Ark.*, 265 Ark. 65 (1974). *See also, Witham v. Mabry*, 596 F.2d 293 (8th Cir. 1979).

There is no indication that the Arkansas Supreme Court would consider a second petition under Rule 37. The petitioner, thus, has exhausted his remedies.

Although the issue of the withdrawn offer was not raised until after the hearing, the facts are not disputed and the Court will address the issue on its merits. Since the Supreme Court decided *Santobello v. New York*, 404 U.S. 257 (1971), fairness in the plea bargaining process has been viewed as having constitutional dimensions. In almost all decisions, however, the right of the defendant to enforce a plea bargain has been limited to situations in which the defendant has entered his plea of guilty. The petitioner here asserts that the withdrawal of the offer after only his acceptance is fundamentally unfair and requires enforcement by the Court of the bargain. [4]

In *Cooper v. United States*, 594 F.2d 12, 18 (4th Cir. 1979), the Court found a right to enforcement of plea bargains before entering a guilty plea " . . . under appropriate circumstances . . . and on the basis alone of expectations reasonably formed in reliance upon the honor of the government in making and abiding by its proposals." The sources of the constitutional rights found by the Fourth Circuit are the rights to fundamental fairness embraced within substantive due process guarantees and the right to effective assistance of counsel.

In explaining the application of the right to effective assistance of counsel in the context of a withdrawn offer by government, the court stated:

> To the extent that the government attempts through defendant's counsel to change or retract positions earlier communicated, a defendant's confidence in his counsel's capability and professional responsibility, as well as in the government's reliability are necessarily jeopardized and the effectiveness of counsel's assistance easily compromised. At the very least, these Sixth

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[4]The petitioner also asserts that the failure of his counsel to attempt to enforce the plea bargain in Court deprived him of effective assistance of counsel. The Court finds this assertion to be without merit.

> Amendment considerations add a heightened degree of obligation to the government's fundamental duty to negotiate with scrupulous fairness in seeking guilty pleas. Footnote omitted.

Cooper at 18, 19.

The elements crucial to the Cooper court's holding were the specific and unambiguous form of the government's proposal; the reasonable context of the proposal in specific context; the apparent or actual authority of the prosecutor at the time; the prompt communication to the defendant; the prompt and unequivocal assent by the defendant; the prompt communication of acceptance to the government; and the lack of extenuating circumstances affecting the government's or any public interest unknown when the proposal was extended.

In *Virgin Islands v. Scotland*, No. 79-1188 (3rd Cir. Feb. 1980), the Third Circuit declined to follow the *Cooper* rationale. Although it found that Cooper was so factually similar to *Scotland* that alleged distinctions were spurious, the Third Circuit rejected both the Sixth Amendment and due process findings of the Fourth Circuit. As to effective assistance of counsel, the Third Circuit after noting the court in *Cooper* observed that the prosecutor made the offer without any attached condition, reasoned:

> It is reasonable to extrapolate that defense counsel could have a duty to inform his client that an offer proposal is conditional if the prosecutor had so informed him. Thus, according to the *Cooper* rationale, defendant's knowledge of such a contingency would remedy the ineffective assistance of counsel claim. As a practical matter it may be presumed that the government in the Fourth Circuit will make only conditional offers to defendants. If this type of "conditional" offer was not alone sufficient under the *Cooper* holding, the next logical step would be for a court to inquire as to whether the condition that the prosecutor cites is a legitimate

> one or one simply to avoid the holding of *Cooper*. Given the established breadth of prosecutorial discretion at all stages of the criminal process, particularly in charging and plea negotiation, see *Bordenkircher v. Hayes*, 434 U.S. 357 (1978), this type of inquiry would appear to be an invasion of that discretion. Although *Cooper* does not go that far, it does invade the province of the United States Attorney and there is potential for further questionable concrete invasions.

Scotland, supra, slip op. at 6, note 6.

In addressing the due process issue, the Third Circuit found:

> Although the contentions concerning prosecutorial discretion and the discouragement of pleas are persuasive, the availability of an alternative remedy for the defendant is the convincing factor for rejecting the *Cooper* rule.
>
> If the defendant is not allowed to compel specific performance of a plea proposal, he may withdraw his tendered plea or refuse to consent to any new bargain proposed by the prosecutor. It may be argued that this "remedy" is insufficient, particularly in cases where, as here, the government's acts were far from exemplary. However, the defendant is then entitled to his constitutional right to trial by jury. This fundamental right would be belittled if we held it to be an insufficient "remedy" or result for a defendant who has not been induced to rely on the plea to his detriment. The prosecutor is under no duty to plea bargain—if no offer is made, the defendant is entitled to a trial. There is no rational basis for holding, in essence, that a trial is sufficient for the defendant who has not been offered a plea and insufficient for the one who has. The courts cannot compel the prosecutor to offer a plea bargain to eliminate the resulting discrimination between these two types of defendants. There is no rule that dictates that the prosecutor may not simply let a case go to trial.

> In the case sub judice, Springette is in the same position as if he had not been offered a plea because no detrimental reliance is alleged. Thus we reject a *Cooper*-type rule that would allow specific performance of an unconsummated plea in the absence of such detrimental reliance because a jury trial on the charge is an adequate remedy.
>
> When, however, the defendant detrimentally relies on the government's promise, the resulting harm from this induced reliance implicates due process guarantees. This basic estoppel principle was recognized by the Court in *Santobello*, when a defendant pleads guilty in reliance on an agreement with the prosecutor, that promise must be fulfilled. *Santobello* arguably could be extended to cover the situation where the defendant has not yet entered the plea but has relied on the bargain in such a way that a fair trial would no longer be possible. There is no claim in this case of such reliance. Absent such reliance, we do not find the *Cooper* rule compelling. (Footnote omitted)

Scotland, supra, slip op. at 9.

The case sub judice is also factually similar to *Cooper* and the rationale used by the Fourth Circuit would apply. This Court, however, agrees with the compelling reasoning of the Third Circuit in *Scotland*.

THREFORE, IT IS ORDERED that this petition be, and it is hereby dismissed with prejudice.

IT IS SO ORDERED this 27th day of August.

/s/ Henry L. Jones, Jr.
United States Magistrate

United States Court of Appeals
For the Eighth Circuit
May 9, 1983
Attorney General
of
Arkansas

No. 81-2181

George Johnson, *
*
Appellant, *
* Appeal from the United
v. * States District Court
* for the Eastern District
James Mabry, Commissioner, * of Arkansas
Arkansas Department of Correction, *
*
Appellee. *

Submitted: October 15, 1982
Filed: May 6, 1983

Before LAY, Chief Judge, McMILLIAN AND JOHN R. GIBSON, Circuit Judges.

McMILLIAN, Circuit Judge.

George Johnson appeals from a final order entered in the District Court for the Eastern District of Arkansas dismissing his petition for writ of habeas corpus, 28 U.S.C. §2254. For reversal petitioner argues that the district court erroneously refused (1) to grant specific performance of a

proposed plea bargain and (2) to shift the burden of proof to the state to show that petitioner's ineffective assistance of counsel was not prejudicial. For the reasons discussed below, we reverse and remand.

Petitioner's case, like those of many other state habeas petitioners, has become procedurally complicated. For a statement of the facts underlying petitioner's criminal convictions, see *Johnson v. State*, 252 Ark. 1113, 482 S.W.2d 600 (1972). According to the evidence presented by the state, in May 1970 petitioner and Eddie Jackson broke into the house of W.A. Siscoe with the intent to commit burglary. Mr. and Mrs. Siscoe and their daughter Vicki arrived home in the middle of the burglary. Vicki was the first person to enter the house; she confronted the intruders and screamed. Mr. Siscoe heard Vicki's screams and entered the house. One of the intruders threatened to kill him and grabbed Vicki and used her to shield his escape from the house. At this point shots were exchanged by one of the intruders and Mr. Siscoe. Vicki was fatally wounded, and petitioner and Mr. Siscoe were wounded.

Petitioner was convicted of first degree murder for the death of Vicki Siscoe and sentenced to life imprisonment. Petitioner was subsequently convicted of burglary and assault with intent to kill on June 15, 1971; these charges arose out of the same incident. Petitioner was sentenced to 21 years imprisonment for the burglary and 12 years for the assault, to be served concurrently. On July 17, 1972, petitioner's murder conviction was reversed by the Arkansas Supreme Court for failure to give a requested jury instruction and remanded for a new trial. *Johnson v. State*, 482 S.W.2d at 606.

The state trial court appointed Harold Hall of the public defender's offfice to represent petitioner. The following facts about the plea bargaining negotiations are not disputed. On Friday, October 27, 1972, the prosecuting attorney contacted Hall and proposed a 21-year sentence, to

be served *concurrently* with petitioner's burglary and assault sentences, in exchange for a guilty plea to the charge of accessory after a felony murder. Hall told petitioner the terms the next day, Saturday, October 28, 1972. Petitioner agreed to accept the plea proposal. The following Monday, October 30, 1972, Hall called the prosecuting attorney and accepted the plea bargain. However, the prosecuting attorney told Hall that a mistake had been made and withdrew the proposal. The prosecuting attorney then proposed a recommendation of a 21-year sentence to be served *consecutively* to petitioner's other sentences. Apparently Hall did not respond to this second proposal and assigned the case to another public defender, John Achor.

Petitioner proceeded to trial November 8, 1972. On November 9, 1972, the trial court declared a mistrial, evidently on the ground of prejudicial newspaper publicity, excused the jury and rescheduled the trial for December 7, 1972. The trial was later continued to February 26, 1973, when petitioner entered a guilty plea to the charge of accessory after a felony murder and was sentenced to 21 years imprisonment, to be served *consecutively* to the burglary and assault sentences.

Petitioner sought post-conviction relief in the state courts on the grounds of mistake and ineffective assistance of counsel. The state trial court denied relief and its decision was affirmed by the Arkansas Supreme Court in an unpublished opinion, *Johnson v. State*, No. CR-78-18 (Ark. June 5, 1978). Petitioner then filed the petition for writ of habeas corpus, alleging mistake, coercion and ineffective assistance of counsel. Petitioner argued that he did not understand the nature and consequences of the plea bargain and pled guilty only because his defense attorney threatened him with life imprisonment if he went to trial. Petitioner also argued that he received ineffective assistance of counsel because his defense attorney did not discuss the case with him until ten minutes before trial, failed to inter-

view witnesses and did not explain the nature and consequences of the plea bargain.

The district court referred the petition to a magistrate for an evidentiary hearing and report and recommendation. Petitioner, Hall and Achor testified at the first evidentiary hearing in August 1979. At this point petitioner raised an additional constitutional issue, alleging that the prosecuting attorney's withdrawal of the plea bargain proposal after petitioner's acceptance was unconstitutional. The magistrate held supplemental evidentiary hearings in October and December 1980, at which petitioner, Lacey Gordon [1] and Benny Kelley [2] testified.

The district court adopted the magistrate's report and recommendation, *Johnson v. Mabry*, No. PB-C-78-139 (E.D. Ark. Sept. 17, 1981), finding that petitioner's mistaken belief about the sentence he would receive if he pled guilty was not reasonably justified, [3] that petitioner's guilty plea was not induced by threats or misrepresentations by

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[1]Lacey Gordon is a friend of petitioner's and one of three persons petitioner claims were with him on the night of the burglary and shooting.

[2]Benny Kelley is a friend of petitioner's and one of three persons petitioner claims were with him on the night of the burglary and shooting.

[3]*See Griffith v. Wyrick*, 527 F.2d 109, 113 (8th Cir. 1975); *United States ex rel. Curtis v. Zelker*, 466 F.2d 1092, 1098 (2d Cir. 1972), *cert. denied*, 410 U.S. 945 (1973). Here, the record contains statements made by the state trial judge before acceptance of the guilty plea that petitioner "agreed to take twenty-one years on top of the twenty-one he's got [for the burglary and assault] which will make a total of forty-two years." The court also credited the testimony of Achor, who testified that he discussed the nature and consequences of the plea bargain with petitioner, specifically explained to petitioner that the proposed plea bargain sentence represented a total sentence of 42 years and even attempted to compare the possibility of parole for a 42 year sentence with that of a life sentence.

defense counsel, [4] and that petitioner was not prejudiced by ineffective assistance of counsel. [5] The court also rejected

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[4]The court concluded that petitioner's allegation of a mistaken belief that the sentence of the guilty plea (that petitioner voluntarily pled guilty but thought the sentence was for 21 years concurrent) was logically inconsistent with his allegation of coercion (that defense counsel threatened that petitioner would be convicted and sentenced to life if he went to trial). Slip op. at 6. We also note that defense attorney Achor testified that after reviewing the transcript of petitioner's first trial and the opinion of the Arkansas Supreme Court and interviewing Siscoe and several of the police witnesses, he believed that if petitioner went to trial, he would be convicted and would probably receive a life sentence and that he told this to petitioner.

[5]The court found that petitioner's defense attorney failed to attempt to locate and interview Eddie Jackson, Lacey Gordon and Benny Kelley. *E.g., Ford v. Parratt*, 638 F.2d 1115, 1117 (8th Cir.) (failure to investigate rumor), *vacated on other grounds*, 454 U.S. 934 (1981); *Morrow v. Parratt*, 574 F.2d 411, 413 (8th Cir. 1978) (failure to interview witnesses). Although Achor testified that petitioner never mentioned Gordon or Kelley, the court noted that petitioner testified at the first trial that he had been riding around in a car with Jackson, Gordon and Kelley that night and that Gordon and Kelley had dropped Jackson and petitioner off in front of the Siscoe house. Both Gordon and Kelley testified at the supplemental evidentiary hearings that they knew petitioner, were not involved with petitioner or Jackson on the night of the shooting and only heard about the incident "on the street." The record also indicates that Jackson, the individual who broke into the Siscoe house that night and who, according to petitioner, fired the gun, was in the state penitentiary at the time of petitioner's retrial and guilty plea. It appears, however, that Jackson was released on parole in 1977 and is currently wanted by state authorities for violating the conditions of his parole. Jackson has been unavailable as a witness.

The court concluded that defense counsel's failure to attempt to locate and to interview Gordon and Kelley did not prejudice petitioner's ability to make an intelligent and voluntary plea. Slip op. at 9; *see Ford v. Parratt*, 638 F.2d at 1118; *United States v. Davis*, 616 F.2d 365, 366 (8th Cir. 1980) (per curiam); *Nevels v. Parratt*, 596 F.2d 344, 346 (8th Cir.), *cert. denied*, 444 U.S. 859 (1979). Although the court agreed that the unavailability of Jackson was a changed circumstance beyond petitioner's control, the court refused to shift the burden of proof to the state to show the absence of prejudice in defense counsel's failure to attempt to locate and interview Jackson. Slip op. at 9, *citing McQueen v. Swenson*, 498 F.2d 207, 220 (1974). The court concluded that it was unreasonable to assume that Jackson's testimony would have differed from that of Gordon or Kelley, have been helpful to petitioner, or have influenced his decision to plead guilty.

petitioner's claim that the prosecuting attorney's withdrawal of the plea bargain proposal was unconstitutional.[6] Slip op. at 11-12, *citing Government of Virgin Islands v. Scotland*, 614 F.2d 360, 363-65 (3d Cir. 1980) (*Scotland*). The district court dismissed the petition and this appeal followed. On appeal petitioner argues that (1) he has a constitutional right to enforcement of the plea bargain proposal and (2) because of the changed circumstances beyond petitioner's control, the court should have shifted the burden of proof to the state on the question of the absence of prejudice. Because we agree with petitioner's first argument, we do not reach the burden of proof question. *See* note 5 *supra*.

In 1971 the Supreme Court recognized that the "disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called 'plea bargaining,' is an essential component of the administration of justice," which, if "[p]roperly administered, . . . is to be encouraged." *Santobello v. New York*, 404 U.S. 257, 260 (1971); *see also Brady v. United States*, 397 U.S. 742, 751-52 (1970) (discussing advantages of plea bargained dispositions for criminal justice administration). The Court's approval of plea bargaining "presuppose[d] fairness in securing agreement between an accused and a prosecutor." *Santobello v. New York*, 404 U.S. at 261. The Court held that "[t]his phase of the process of criminal justice, and the adjudicative element inherent in accepting a plea of guilty, must be attended by safeguards to insure the defendant what is reasonably due in the circumstances." *Id.* at 262. The source of the fairness requirement is constitutional, presumably substantive due process, *see Cooper v. United States*, 594 F.2d 12, 15-16 (4th Cir. 1979) (*Cooper*); *see also Santobello v. New*

[6] As noted by the court below, petitioner did not raise this issue in the post-conviction proceedings in Arkansas state courts. However, the Arkansas courts will not entertain successive petitions for relief, at least not in noncapital cases. Therefore, the court concluded that petitioner had exhausted his available state remedies. Slip op. at 10. We agree.

York, 404 U.S. at 266-67 (Douglas J., concurring) (specifically noting that *Santobello* is a state case over which the Supreme Court has no supervisory jurisdiction and recognizing a constitutional basis for the holding); Westin & Westin, *A Constitutional Law of Remedies for Broken Plea Bargains*, 66 Calif. L. Rev. 471, 474-75 n.10, 476 n.16 (1978) (hereinafter *Broken Plea Bargains*);Comment, *Specific Enforcement to Ensure Due Process in Plea Bargaining*, 21 Wm. & Mary L. Rev. 521 (1979), and mandates that "the most meticulous standards of both promise and performance must be met by prosecutors engaging in plea bargaining." *Correale v. United States*, 479 F.2d 944, 947 (1st Cir. 1973); *see United States v. Bowler*, 585 F.2d 851, 854 (7th Cir. 1978) ("to protect the plea bargaining defendant from overreaching by the prosecutor and to insure the integrity of the plea bargaining process"); *Palermo v. Warden*, 545 F.2d 286, 296 (2d Cir.), *cert. denied*, 431 U.S. 911 (1976); *Geisser v. United States*, 513 F.2d 862, 863 (5th Cir. 1973); *cert. denied*, 450 U.S. 1031 (1981) (following several remands).

In general the legal analysis in plea bargaining cases has relied heavily upon contract law principles, in particular emphasizing contract formation (offer and acceptance), breach, estoppel (entry of guilty plea or detrimental reliance), and remedies (rescission or specific performance). *See, e.g., Scotland*, 614 F.2d at 364; [7] *Cooper*, 594 F.2d at 16 (citing cases from Fourth Circuit); *People v. Calloway*, 29 Cal. 3d 666, 631 P.2d 30, 175 Cal. Rptr. 596 (1981) (bank); *People v. Kaanehe*, 19 Cal. 3d 1, 559 P.2d 1028, 136 Cal. Rptr. 409 (1977); *Shields v. State*, 374 A.2d 816, 819 (Del.), *cert. denied*, 434 U.S. 893 (1977); *see generally Broken Plea Bargains*, 66 Calif. L.Rev. at 525. Other cases, however,

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[7] "The bargaining process has often been analogized to contract principles, and plea agreements are often likened to unilateral contracts – consideration is not given for the prosecutor's promise until the defendant actually enters his [or her] plea of guilty." *Government of Virgin Islands v. Scotland*, 614 F.2d 360, 364 (3d Cir. 1980) (*Scotland*) (footnote omitted).

have recognized that contract law is useful only as an analogy. *See United States v. Calabrese*, 645 F.2d 1379, 1390 (10th Cir.) (analogy to contract law is not determinative in plea negotiations), *cert. denied*, 451 U.S. 1018 (1981); *Cooper*, 594 F.2d at 16-20; *United States ex rel. Selikoff v. Commissioner of Correction*, 524 F.2d 650, 654 (2d Cir. 1975), *cert. denied*, 425 U.S. 951 (1976); *cf. Brewer v. Williams*, 430 U.S. 387, 401 n.8 (1977) ("We do not deal here with notions of offer, acceptance, consideration, or other concepts of the law of contracts. We deal with constitutional law."); *Roe v. United States Attorney*, 618 F.2d 980, 981 (2d Cir.) (per curiam) (court of appeals will not use doctrine of actual authority in context of promises made by government officials), *cert. denied*, 449 U.S. 856 (1981); *United States v. Bowler*, 585 F.2d at 854 ("A plea agreement is not an appropriate context for the Government to resort to a rigidly literal approach in the construction of language.") *See generally Broken Plea Bargains*, 66 Calif. L. Rev. at 527-28 (proposing theory of "constitutional contracts").

The analogy between contracts and plea agreements works well in the usual plea bargain case, which involves the entry of a guilty plea, or the performance of some other action, following plea negotiations and an agreement about specific terms. *E.g., United States v. Runck*, 601 F.2d 968, 970 (8th Cir. 1979) (on petition for rehearing) (following entry of negotiated plea, dispute arose over whether part of sentence was within plea agreement accepted by district court). Traditional contract principles, however, are of little guidance in a plea proposal case like the present one. Here, as in *Cooper* and *Scotland*, we are confronted with a fact situation that falls short of a plea bargain. [8] Petitioner did not enter a plea of guilty in court and has not performed any

[8] Here, the prosecuting attorney proposed the 21-year concurrent sentence on Friday; the defense attorney discussed the plea proposal with petitioner on Saturday and petitioner agreed to accept the plea proposal that day. The defense attorney contacted the prosecuting attorney on Monday and accepted the plea proposal, but the prosecuting attorney

then withdrew the plea proposal, explaining only that a mistake had been made. In *Cooper* the relevant events occurred on the same day: about 11 a.m. the prosecuting attorney and defense attorney discussed the terms of the plea proposal; the defense attorney immediately discussed the plea proposal with the defendant, who agreed to accept; about 12 p.m. the defense attorney attempted to contact the prosecuting attorney; about 1:30 p.m. the prosecuting attorney's superior reviewed the plea proposal and instructed the prosecuting attorney to withdraw the plea proposal before the defense attorney accepted. 594 F.2d at 15. In *Scotland* the time interval is greater, but the facts are essentially the same. 614 F.2d at 363. On November 11 the prosecuting attorney made its plea proposal; the terms were communicated to the defendant on November 29 and defendant agreed to accept them at that time; the prosecuting attorney, however, added a new condition to the plea proposal; the defendant moved for specific performance of the initial plea proposal. *Id.* at 361-62.

Present in each case are the following factors that the *Cooper* court considered crucial to the finding of a constitutional right and violation:

> [1] the proposal was specific and unambiguous in form, and [2] was made without any reservation related to a superior's approval or otherwise; [3] its content was reasonable in context; [4] it was made by a prosecutor with apparent (and probably actual) authority at the time; [5] it was communicated promptly to the defendant so that no question of staleness was involved; [6] the defendant assented promptly and unequivocally to its terms, indicated . . . assent to [defense] counsel, and was entitled so far as the record shows to assume that its communication to the government would consummate the plea agreement; [7] defense counsel did in fact within a matter of a few hours [or within several days] communicate defendant's acceptance to the government, by sheer fortuity being told of the government's "withdrawal" before [defense counsel] could vocalize [defendant's] "acceptance"; and finally, [8] the reason for the attempted withdrawal had nothing to do with extenuating circumstances affecting the government's or any public interest that were unknown when the proposal was extended, but [apparently] lay simply in a superior's second-guessing of a subordinate's judgment.

594 F.2d at 19. *Cf. People v. Calloway*, 29 Cal.3d 666, 631 P.2d 30, 175 Cal. Rptr. 596, 603 n.3 (1981) (bank) (Bird, C.J., dissenting) (factors which favor the prosecution's choice of remedy for broken plea bargains: fraud by the defendant, additional information developed later and changed circumstances); *People v. Johnson*, 10 Cal. 3d 895, 519 P.2d 604, 112 Cal. Rptr. 556 (1974) (bank) (defendant concealed true name and past criminal record).

specific action in reliance upon the plea bargain. *Compare Palermo v. Warden*, 545 F.2d at 290 (defendants offered reduced sentences and early parole in exchange for return of stolen jewelry); *See United States v. Bowler*, 585 F.2d at 852 (plea agreement provided for dismissal of counts and recommended sentence if defendant cooperated in further prosecutions and other investigations). However, petitioner did rely on the plea proposal to the extent that he considered the terms offered, agreed to accept the plea proposal and communicated his willingness to plead guilty to the prosecuting attorney.

In *Cooper* the Fourth Circuit found "the constitutional right to 'fairness' [set forth in *Santobello*] to be wider in scope than that defined by the law of contract" and recognized "a constitutional right to enforcement of plea proposals [which] may arise before any technical 'contract' has been formed, and on the basis alone of expectations reasonably formed in reliance upon the honor of the government in making and abiding by its proposals." 594 F.2d at 16-18 (footnotes omitted). The *Cooper* court based this constitutional right on substantive due process: it is simply unfair to permit the government in effect to go back on its word. *Id.* at 18-19; *cf. Broken Plea Bargains*, 66 Calif. L. Rev. at 513 (arguing that *Santobello* can be understood as extending constitutional protection to the personal expectations created in defendants by plea agreements with the state). The *Cooper* court also relied upon the sixth amendment right to effective assistance of counsel:

> Because prosecutors are required to conduct plea negotiations through defense counsel, the government's positions and communications in plea discussions are necessarily mediated through his [or her] counsel . . . . To the extent that the government attempts through defendant's counsel to change or retract positions earlier communicated, a defendant's confidence in his [or her] counsel's capability and professional responsibility, as well as the government's reliability, are

> necessarily jeopardized and the effectiveness of counsel's assistance easily compromised.

594 F.2d at 18-19 (footnote omitted). The holding in *Cooper* was very narrow:

> When . . . a proposal—specific, unambiguous and not unreasonable on its face—is offered by the government to a defendant through his [or her] counsel, constitutional fairness requires that it be fulfilled if within a reasonable time the defendant unequivocally [agrees to accept] it, and unless in the interval extenuating circumstances affecting the propriety of the proposal that were unknown to and not reasonably discoverable by the government when the proposal was made have supervened or become known.

Id. at 19; *see* note 8 *supra* (listing specific factual considerations relied upon by court). *Cf.* Comment, 21 Wm. & Mary L. Rev. at 536-39 (arguing procedural due process as preferable constitutional basis for *Cooper* holding).

The Third Circuit in *Scotland* rejected the Fourth Circuit's due process analysis on the grounds that it not only interfered with prosecutorial discretion [9] and discouraged pleas, [10] but, more importantly, was unnecessary

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9 "[B]inding the prosecutor to his [or her] original plea [proposal] does interfere with his [or her] discretionary functions, i.e., determining what he [or she] feels is fairest in light of the defendant's circumstances, the government's resources, and the statute involved." *Scotland*, 614 F.2d at 364 (footnote omitted).

10 [Prosecutors] will be reluctant to offer to bargain until they are very sure that they want to be bound by the offer. The fact that the government would have to be very careful about all the elements of the offer certainly is not detrimental. However, if the result of the [*Cooper*] rule is either a delay in bargaining or fewer plea proposals, there is also a consequent diminished savings of prosecutorial and judicial resources. Moreover, the advantages of quick disposition and quick punishment are also diminished.

Id.

because, in the absence of detrimental reliance, a jury trial is an adequate remedy. [11] 614 F.2d at 364-65. The Third Circuit also found no implication of the sixth amendment right to effective assistance of counsel in the government's withdrawal of the plea proposal. [12]

We believe that the *Cooper* analysis should be followed. This approach recognizes the limited usefulness of contract principles in the plea bargaining context. Plea bargaining involves more than commercial law. Because the entry of guilty plea constitutes a waiver of fundamental constitutional rights, *Santobello v. New York*, 404 U.S. at 264 (Douglas, J., concurring), plea bargains are not just contracts in which the prosecution exchanges the dismissal or reduction of charges and recommendations on sentencing for the defendant's guilty plea. Imposing upon the government the duty to conduct plea bargaining with scrupulous

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[11] [The fundamental right to a trial by jury] would be belittled if we held it to be an insufficient "remedy" or result for a defendant who has not been induced to rely on the plea to his detriment. The prosecutor is under no duty to plea bargain – if no offer is made, the defendant is entitled to a trial. There is no rational basis for holding, in essence, that a trial is sufficient for the defendant who has not been offered a plea and insufficient for the one who has.

Id. at 365.

[12] We note that in [all] plea negotiations, even when they do not involve the withdrawal of a plea proposal, there is a possibility that the defendant may lose faith in his [or her] attorney when, for example, the government fails to offer any plea proposal or offers only an unfavorable one. This factor, without more, is not enough to violate the defendant's sixth amendment right. The appropriate focus for determining whether the right to effective counsel has been violated is on defense counsel and his [or her] performance rather than on defendant's perception of defense counsel.

Id. at 363 (footnote omitted). Of course, the court in *Cooper* relied upon the sixth amendment right to effective assistance of counsel as another source of "the government's fundamental duty to negotiate with scrupulous fairness in seeking guilty pleas." 594 F.2d at 19.

fairness, which, in the present case, would require the government to honor the terms of its plea proposal, is consistent with the "fairness" requirement set forth in *Santobello*. As noted in *Cooper*, "constitutional decisions cannot be made to turn in favor of the government on the fortuities of communications or on a refusal to accord any substantive value to reasonably induced expectations that government will honor its firmly advanced proposals." 594 F.2d at 17.

We do not agree that the *Cooper* analysis improperly restricts prosecutorial discretion. The government does not have to initiate or participate in plea bargaining. *See Weatherford v. Bursey*, 429 U.S. 545, 561 (1977). However, once the government does so, it must negotiate with "scrupulous fairness." *Cooper* does not restrict the particular terms that the government may propose during plea negotiations; the government may make conditional proposals and may withdraw or modify outstanding proposals that have not been accepted or rejected after a reasonable period of time. *Cooper* does, however, require the government to honor whatever terms it has proposed if they are promptly and unequivocally agreed to by the defendant. In practice, this means that government attorneys may have to become better organized and scrutinize plea proposals before discussing them with defense counsel. *See*, 594 F.2d at 20. Further, requiring the government to conduct plea negotiations in a more orderly manner should not necessarily discourage guilty pleas. A more orderly method should reduce arbitrary action and promote greater consistency in the disposition of similar cases, thus encouraging defendants to enter pleas. *See* Comment, 21 Wm. & Mary L. Rev. at 536-38. Moreover, *Cooper* expressly contemplates that the government can withdraw a plea proposal or reopen plea negotiations, even after the plea proposal has been accepted by the defendant, if the government demonstrates that the plea proposal was based upon inaccurate or incomplete information, for example, if the defendant misrepresents or conceals relevant information or there is additional information that was not reasonably discoverable at the time the plea proposal was offered. 594 F.2d at 19.

Nor can we agree that a jury trial is an adequate remedy in cases like the present one. In terms of the contract law analogy, trial does not provide the defendant with the benefit of the bargain, that is, jury trial will not protect the defendant's reasonable expectations that the government will honor its proposals. Nor does the alternative of jury trial really address the conduct of the government. We are concerned here with what the Fourth Circuit in *United States v. Carter*, 454 F.2d 426, 428 (4th Cir. 1972) (banc), *cert. denied*, 417 U.S. 933 (1974) (following remand), characterized as "the honor of the government" and "public confidence in the fair administration of justice." Here, the government in effect promised to recommend a specific sentence if petitioner agreed to plead guilty to a specific charge. If we were to hold that jury trial is an adequate remedy in these circumstances, we would have no effective way to discourage the potential abuse of the plea bargaining process. We will not allow the government to take advantage of petitioner's acceptance of the plea proposal, in the absence of any change in the underlying circumstances, and to exploit petitioner's decision to plead guilty by further hard bargaining and by recommending a longer sentence. *Compare Bordenkircher v. Hayes*, 434 U.S. 357, 360-65 (1978) (no violation of due process by prosecutor who carries out threat made during plea negotiations to have accused reindicted on more serious charges on which he is plainly subject to prosecution if he does not plead guilty to offense with which he was originally charged).

In sum, we stress that our holding, like that in *Cooper*, is very narrow and dependent upon the specific facts. *See* note 8 *supra*. The appropriate remedy is a difficult problem in plea bargain cases. *E.g., Santobello v. New York*, 404 U.S. at 263 (specific performance or withdrawal of plea); *Id.* at 266-67 (Douglas, J., concurring); *Correale v. United States*, 479 F.2d at 949-50; *see also Broken Plea Bargains*, 66 Calif. L. Rev. at 474-76. Here, petitioner seeks enforcement of the plea proposal. Accordingly, we reverse the dismissal of the petition for habeas corpus and remand the case to the

district court with directions to grant the writ of habeas corpus unless the state resentences petitioner in accordance with the concurrent sentence plea proposal within 120 days of the filing of this opinion.

JOHN R. GIBSON, Circuit Judge, dissenting.

I respectfully dissent. I believe the better view is that detrimental reliance is necessary to enforce an offer for a plea bargain. *Government of Virgin Islands v. Scotland*, 614 F.2d 360 (3d Cir. 1980). My view and that in *Scotland* is not based upon contract principles. As stated in *Scotland*, detrimental reliance implicates due process guarantees. 614 F.2d at 365. The court in *Scotland*, discussed *Santobello v. New York*, 404 U.S. 254 (1971), and reasoned that *Santobello* recognized a basic estoppel principle. In *Santobello* the guilty plea had been entered on June 16, 1969, in reliance on an offer that the prosecuting attorney would not recommend a sentence. It was only when the defendant appeared before a different judge for sentencing on January 9, 1970, that he learned that the agreement had been broken. *Santobello* thus dealt with a situation in which there had been detrimental reliance.

I believe that the majority has adopted a chameleon approach to reliance. The majority first states that petitioner "has not performed any specific action in reliance upon the plea bargain." Slip op. at 09-10. It continues "[h]owever, petitioner did rely on the plea proposal to the extent that he considered the terms offered, agreed to accept the plea proposal and communicated his willingness to plead guilty to the prosecuting attorney." Slip op. at 10.

It is abundantly clear that the majority has found no detrimental reliance in this case, and its holding requires no detrimental reliance. The majority specifically adopts the reasoning in *Cooper v. United States*, 594 F.2d 12 (4th Cir. 1979), as opposed to the approach in *Scotland*. *Scotland* requires a showing of detrimental reliance to enforce a plea of-

fer, but *Cooper* makes no such requirement. Accordingly, the extended discussion adopting *Cooper* is unnecessary unless the majority really is finding that there was no detrimental reliance in this case. If there was detrimental reliance, both *Scotland* and *Cooper* would support enforcement of the plea offer.

The magistrate in his report and the district court in its order adopting the report concluded that no detrimental reliance was present. Immediately after a lengthy quotation from *Scotland* underscoring the distinction that *Cooper* would allow specific performance of a plea offer where there was no detrimental reliance, the magistrate stated that the case was factually similar to *Cooper*. The petition for habeas corpus as originally filed makes no reference to detrimental reliance, nor does the motion to amend filed by petitioner's counsel. Petitioner's counsel, in his objections to the proposed findings and conclusions details a finding of detrimental reliance based upon counsel's lack of preparedness to go to trial November 8, 1972. This argument does not bear upon the issue before us, however, as the November 8 trial resulted in a mistrial and petitioner's guilty plea was not entered until February 26, 1973.

Cooper enumerated several limitations on its holding. Among the qualifications stated in *Cooper* is that the plea offer be reasonable in context. Johnson had originally been convicted of first degree murder and sentenced to life imprisonment. The conviction on this charge was set aside and the guilty plea now before us was later entered to the lesser charge of "accessory after a felony murder." Johnson's conviction of burglary carried a twenty-one year sentence and his assault with intent to kill conviction carried a twelve year concurrent sentence. I question whether we can conclude it is reasonable for the prosecutor to offer a concurrent twenty-one year sentence on the murder charge, or accessory after a felony murder charge, which would result in defendant's receiving the same sentence for murder, burglary and assault that he had received for burglary and

assault alone. There is no explanation in the record as to the nature of the mistake that was the reason for the withdrawal of the plea offer. We can only speculate that the prosecutor may have intended to offer a consecutive twenty-one year sentence but mistakenly said "concurrent". That there was a mistake in making the offer in this case, however, is further distinction from the limited circumstances in *Cooper*, which involved the overruling of a subordinate by a superior in the United States Attorney's office.

Cooper stressed the significance of this distinguishing circumstance in the following statement:

> This necessarily means that once presented, such a proposal may not be withdrawn in the face of proffered acceptance for no other reason than that a superior disagrees with an apparently authorized subordinate's judgment in making it.

Cooper v. United States, 594 F.2d at 19.

While *Cooper* is careful to make plain the factual limitations on the scope of its holding and the majority here seems to do so, the net result in this case is simply to expand the *Cooper* rule to an unacceptable extreme.

The majority also holds that a jury trial is an inadequate remedy where a plea bargain offer is withdrawn. [1] I find more persuasive the reasoning in *Scotland* that the great constitutional right to trial by jury is an adequate remedy. While it is true, as the majority states, that a jury trial will not give the defendant the benefit of his bargain with the government, he is not entitled to any particular sentence within the range provided in the statute for the crime with which he is charged. When the government

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[1] Interestingly the majority opinion reverts to the contract law analogy in discussing this question.

mistakenly makes an offer and then withdraws it, defendant is not being deprived of a specific sentence to which he has a constitutional right.

The majority and *Cooper* make much of fairness. In *Cooper*, however, the withdrawal of the plea offer based on the superior's overruling of the subordinate is a distinct kind of unfairness to the defendant. But here a mistake by the prosecutor involves the interest not only of the defendant, but of the public as well, and has fairness implications of a far different nature. A mistake should be given different treatment from what was at best the insistance on an organizational, if not bureaucratic, prerogative.

For the foregoing reasons, I would affirm.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

GEORGE JOHNSON — APPELLANT

VS. — No. 81-2181
(Dist. Ct. No. PB-C-79-139)

JAMES MABRY, Commissioner
Arkansas Department of Correction — APPELLEE

PETITION FOR REHEARING EN BANC

PRELIMINARY STATEMENTS: **This petition is submitted pursuant to Rule 35 of the Federal Rules of Appellate Procedure and Rule 16 of the Rules of the United States Court of Appeals for the Eighth Circuit. Appellee**

seeks reconsideration of this Court's decision of May 6, 1983 reversing the District Court's denial of federal habeas corpus relief.

FACTUAL BACKGROUND: The appellant was convicted by a jury on November 23, 1970 of murder in the first degree and was sentenced to a term of life imprisonment. The conviction arose from an incident which occurred in a residence in Little Rock, Arkansas, described by the Arkansas Supreme Court as follows:

> Mr. and Mrs. W.A. Siscoe and their daughter Vicki arrived home from the Siscoe grocery store on the night of May 22, 1970 at about 10:45 p.m. Mrs. Siscoe drove her vehicle into the driveway, parked it and awaited her daughter and husband who followed her in a vehicle driven by the husband. He stopped his car and the daughter got out, opened the front door and entered the Siscoe dwelling. Her father heard her screaming inside the house and ran inside, armed with a .38 caliber revolver, where he became aware of the presence of an intruder who threatened to kill him and began firing a weapon. When Siscoe returned the fire, the intruder grabbed Vicki, swung her around as a body shield and a scuffle ensued during which Siscoe fired, or attempted to fire over the intruder's shoulder. Shots were fired by the father and by at least one intruder. In the exchange of gunfire, Vicki Siscoe was struck by a bullet from her father's weapon and another from a .22 caliber weapon obviously fired by the intruder. The state medical examiner testified that, in his professional opinion, Vicki's death was caused by a large caliber bullet of the same type as a .38 caliber slug exhibited to him. Both appellant, who admitted his presence in the house at the time, and W.A. Siscoe were wounded. All three wounded persons were admitted at Baptist Medical Center, where Vicki Siscoe died. ***Johnson v. State***, **252 Ark. 1113, 1114 (1972).**

Subsequent to his conviction for murder, the appellant was, on June 15, 1971, found guilty of burglary and assault with intent to kill (re: Mr. Siscoe) and was sentenced to 21 years. In July 1972, the Arkansas Supreme Court reversed the conviction for first degree murder due to the trial court's failure to give a requested jury instruction. *Johnson v. State*, 252 Ark. 1113 (1972).

Shortly after the murder conviction was reversed, the public defender was appointed to represent the appellant upon retrial. On Friday, October 27, 1972, a deputy prosecuting attorney offered the public defender a plea proposal consisting of a 21 year sentence to be served concurrently with the 21 year sentence appellant was serving for burglary and assault. The next day the public defender journeyed to the penitentiary where he visited with appellant regarding the offer. In his discussion with counsel, appellant agreed to enter a plea of guilty in exchange for a 21 year concurrent sentence.

On Monday, October 30, 1972, the next working day after the offer had been made, the public defender called the prosecutor's office for the purpose of accepting the plea offer. The public defender was informed that a mistake had been made and that the sentence could not be made concurrent but rather, would have to be *consecutive* to the previous 21 year sentence. Thereafter, the case was assigned to the chief deputy public defender.

A trial date of November 8, 1972 was set for appellant's case. On November 9, a mistrial was declared and the case was reset for December 7 and 8, 1972. The case was again continued to February 26, 1973. On February 26, 1973, the appellant entered a plea of guilty to the charge of accessory after a felony murder and was sentenced to a term of 21 years, to be served consecutive to his previously imposed 21 year sentence.

State post-conviction relief was denied by the trial court and by the Arkansas Supreme Court in 1978. Appellant's petition for writ of habeas corpus was filed on August 21, 1978. On August 10, 1979, the District Court allowed the appellant to amend his petition to allege an unlawfully induced and involuntarily made guilty plea and ineffective assistance of counsel.

Subsequent to the initial hearing in this cause which included testimony concerning the conflicting allegations of (1) unlawfully induced/coerced guilty plea and (2) failure to receive the sentence he bargained for, the appellant submitted a post-hearing brief wherein he asserted an alternative ground for relief never before presented and which was inconsistent with his earlier grounds—to wit: that he had a constitutional right to enforce the original offer made by the deputy prosecuting attorney. The District Court ultimately rejected appellant's allegations with regard to the guilty plea and denied the requested relief. *Johnson v. Mabry*, F. Supp. ____ (Sept. 16, 1981).

On appeal to this Court, the panel overturned the decision of the District Court and ordered specific performance of the proposed plea agreement in spite of the fact that there had been no showing that the accused relied to his detriment on the proposed offer.

REASONS FOR REHEARING EN BANC: The instant case raises the following constitutional question of exceptional importance: In the absence of a showing of detrimental reliance or resultant prejudice, and prior to the entry of a guilty plea, does a defendant have a constitutional right to specific performance of a plea proposal which was made on Friday and withdrawn the following Monday due to a mistake on the part of the prosecuting attorney?

ARGUMENT IN SUPPORT OF REHEARING: In its May 6, 1983 opinion, this Court acknowledged that the plea

proposal (21 years concurrent) was conveyed to appellant's counsel on Friday; that on the following Monday, appellant attempted to accept the plea proposal; that the prosecuting attorney indicated that a mistake had been made and the sentence must be consecutive rather than concurrent; that the appellant did not enter a plea of guilty in reliance on the proposal; and that the appellant had not performed any specific action in reliance upon the plea. See Slip Opinion at pp. 8-9 and f.n. 8. The Court did find however that the appellant relied on the plea proposal to the extent that he considered the terms offered, agreed to accept the proposal and communicated his willingness to plead guilty to the prosecuting attorney. The Court concluded, "We will not allow the government to take advantage of (appellant's) acceptance of the plea proposal, in the absence of any change in the underlying circumstances, and to exploit the (appellant's) decision to plead guilty by further hard bargaining and by recommending a longer sentence. Slip Op. at p. 15.

Appellee respectfully submits that the Court's assertion that the government sought to take advantage of appellant's willingness to accept the proposal and to engage in further hard bargaining in the absence of any change in the circumstances is totally without support in the record. Appellant had been convicted of burglary and assault with intent to kill in connection with the incident at the Siscoe home and had received concurrent sentences of 21 and 12 years. He had also been convicted of first degree murder and sentenced to life imprisonment for the death of Vicki Siscoe, but the conviction was reversed due to an error in submission of jury instructions. Prior to his retrial, a deputy prosecuting attorney proposed to recommend a 21 year concurrent sentence in exchange for a plea of guilty to accessory after felony murder. Testimony at the hearing in the District Court revealed that the deputy prosecutor had made a mistake in offering the concurrent sentence on the lesser charge rather than a consecutive sentence. When these facts are considered, the question as to whether the

change in the terms of the plea proposal from concurrent to consecutive was based upon a mistake having been made (as the testimony indicated) or based upon unscrupulous and unjustified actions of the government (as suggested by the Court) is easily resolved. See also, dissenting opinion at Slip Op. p. 17-18.

Appellee does not take issue with the Court's assertion that there must be fairness in plea bargaining. Indeed, since the decision in *Santobello v. New York*, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971), fairness in plea bargaining has been viewed as having constitutional dimensions. Appellee submits however that fairness is an objective concept which must innure to the benefit of not only the defendant, but the interests of the public and its government as well.

It is clear from reading the *Santobello* decision that reliance upon the plea proposal is a necessary prerequisite to specific enforcement thereof. The Supreme Court wrote: "When a plea rests in a significant degree on a promise or agreement of the prosecutor so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." 404 U.S. at p. 262. The crux of the *Santobello* opinion is that although the accused has no right to have a plea accepted, once a bargain is struck and the accused detrimentally relies upon such agreement, the accused has the right to hold the prosecutor to his end of the bargain.

Of course, *Santobello* concerned a fact situation in which a plea had already been entered and thus is not directly on point with the present case. However, in *Virgin Islands v. Scotland*, 614 F.2d 360 (3d Cir. 1980) the court adopted the *Santobello* rationale of requiring a showing of detrimental reliance upon the plea proposed as a prerequisite to ordering specific performance in a case in which the government attempted to add additional conditions to a plea proposal after the accused indicated his acceptance, but before entry of a guilty plea. Numerous state courts are

in accord. Consider: *People v. Barnett*, 113 Cal. App. 3d 563; *Shields v. Delaware*, 374 A.2d 816, cert. den. 434 U.S. 893; *State v. Reasbeck*, 359 So.2d 564 (Fla. 1978); *State v. Edwards*, 279 N.W.2d 9 (Iowa 1979); *People v. Heiler*, 79 Mich. App. 714, 262 N.W.2d 890 (Mich. 1977); *State v. Collins*, 300 N.C. 142, 265 S.E.2d 172 (N.C. 1980); *State v. Wheeler*, 95 Wash. 2d 799, 631 P.2d 376 (Wash. 1981); *State v. Beckes*, 100 Wis. 2d 1, 300 N.W.2d 871 (Wis. 1980).

Appellee does not suggest that the outcome of the present case should necessarily hinge upon principles of contract law. Rather, the issue should be determined in accordance with constitutional principles. As stated in *Scotland* at p. 365, detrimental reliance by the defendant implicates due process guarantees. In rendering its opinion in the present case, this Court specifically found that the appellant did not perform any action in reliance upon the plea proposal which could constitute detrimental reliance. Slip Op. at pp. 8-9. However, in spite of the lack of detrimental reliance or resultant prejudice, this Court elected to base its decision upon the government's duty to conduct plea bargaining with scrupulous fairness. Slip Op. at p. 13. The Court further implies at page 15 of the Slip Opinion that the government in this case exploited the appellant's decision to plead guilty by further hard bargaining. There is not so much as a scintilla of evidence in this record to demonstrate that the government was unscrupulous or that it sought to exploit the defendant. The testimony revealed that a mistake had occurred, and upon review of the facts the proposed offer does indeed appear to be a mistake. Although not to be condoned as a recurring practice, even a scrupulous and honorable government can make a mistake.

CONCLUSION: A period of six months time passed from the date of appellant's arraignment on charges of murder until he ultimately entered a guilty plea to the charge of accessory after felony murder. During the six month period, a state of confusion existed for approximately 72 hours – Friday until Monday – in connection with a mistaken plea pro-

posal. There has been no evidence to indicate that during this four day period the appellant in any way relied on the mistaken proposal to his detriment. There has been no evidence to demonstrate that the error was anything other than an honest mistake. Although this Court's opinion of May 6, 1983 expressly states that it is very narrow and dependent upon specific facts, the opinion establishes a precedent which runs afoul of constitutional principles. For now, in the absence of evidence to demonstrate detrimental reliance by the accused and in the absence of evidence of bad faith or unscrupulous conduct on the part of the government, this Court holds that an offered plea proposal, one part of which is made by mistake, and which exists for 72 hours over a six month period shall, as a matter of constitutional right, be specifically enforced. Appellee respectfully prays that this Court reconsider its opinion En Banc and that the judgment of the District Court be affirmed.

Respectfully submitted,

STEVE CLARK
Attorney General

By: DENNIS R. MOLOCK
Special Assistant Attorney General
Justice Building
Little Rock, Arkansas 72201
(501) 371-2007

Counsel for Petitioner

CERTIFICATE OF SERVICE

I, Dennis R. Molock, hereby certify that a copy of the foregoing Petition has been served upon appellant by placing a copy of same, postage paid, in the U.S. Mail addressed to Richard Quiggle, 904 W. Second Street, P.O. Box 2651, Little Rock, Arkansas 72203, this 26th day of May, 1983.

/s/ Dennis R. Molock
Dennis R. Molock

RULE 16 (d) CERTIFICATE

I hereby express my belief, based on a reasoned and studied professional judgment, that this case raises the following question of exceptional constitutional importance: Whether, as a matter of constitutional right, an accused is entitled to specific performance of a proffered plea agreement, withdrawn after 72 hours due to mistake, in the absence of any evidence to demonstrate that the accused relied upon such proffered agreement to his detriment, or evidence to demonstrate bad faith or unscrupulous conduct on the part of the government. I further express my belief that this Court's opinion in this case runs afoul of the rationale of the United States Supreme Court in *Santobello v. New York*, 404 U.S. 257 (1971); and that reconsideration by the court en banc is warranted.

/s/ Dennis R. Molock
Dennis R. Molock

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NO. 81-2181-EA	) September Term 1982
George Johnson,	)
Appellant,	)
	) Appeal from the
vs.	) United States District
	) Court for the Eastern
James Mabry, Commissioner,	) District of Arkansas
Arkansas Department of	)
Correction,	)
	)
Appellee.	)
	)
	)

The Court, having considered appellee's petition for rehearing and suggestions for rehearing en banc and being now fully advised in the premises, hereby orders the petition for rehearing and suggestions for rehearing en banc denied. Judges Ross, John R. Gibson and Fagg would grant the petition for rehearing en banc.

June 30, 1983

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NO. 83-328

Supreme Court U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER Term, 1983

James Mabry, Commissioner,
Arkansas Department of Correction. . . . . Petitioner

V.

George Johnson . . . . . Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

RICHARD QUIGGLE
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Attorney for Respondent

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REASONS FOR DENYING THE WRIT

1. Introduction

Petitioner urges the Court to grant a writ of certorari for two reasons. They are: (1) a supposed split between the circuits on whether detrimental reliance must be shown in the plea bargaining process (nominally no, said the Eighth and Fourth Circuits), or whether a defendant must have already entered his/her plea before any constitutional right attached (yes, said the Third Circuit); (2) whether the Eighth Circuit has decided an important constitutional question upon which this Court has not, but should, rule.

For a variety of reasons this supposed controversy does not merit review by this Court, as will be demonstrated below.

2. Factual Considerations

(A). The Split in the Circuits.

Petitioner's most appealing argument is that this Court should accept the case and decide a true division of opinion between the circuits.

If indeed petitioner was correct concerning the circuit split, this argument, based on the Court's historical willingness to hear such cases, would certainly be compelling. However, petitioner's claim of a split in the circuits is based on facile and uncritical reading of the cases in question.

The seminal opinion in connection with this dispute is Santobello v. New York, 404 U.S. 257 (1971), in which this Court held that the so-called "plea bargaining process" had constitutional dimension.[1] The federal district courts and the Courts

[1] Very significantly for purposes of this matter, Santobello strongly suggests that an unfavorable plea bargain can be enforced against a criminal defendant. Sauce for the goose can be sauce for the gander.

of Appeal have unformly adopted this decision. See, for example, U.S. v. Carter, 454 F.2d 426 (4th Cir. 1972) and Geisser v. U.S., 513 F.2d 862 (5th Cir. 1975).

Unquestionably, this Court in Santobello did not, and did not attempt to, resolve every factual situation in which relief was warranted because of the constitutional guarantees implicated in the plea bargain process. Of course, such a approach is logical, since not every possible factual situation can be anticipated.

Following Santobello, as in the cases cited by petitioner demonstrate, most plea bargaining cases have arisen after the plea has been entered. Santobello, however, does not hold that such niceities are required before the constitutional rights of a defendant are implicated.

Then comes the case of Cooper v. U.S., 594 F.2d 12 (4th Cir. 1979); the bone in the petitioner's throat here.

Cooper holds that in the right factual situation, the state can be held to its promises (bargain) even if the defendant has not detrimentally relied upon that promise. The opinion makes clear that the facts of each case are determinative.

A year later, the Third Circuit said that under the facts presented to it in Government of the Virgin Islands v. Scotland, 614 F.2d 360 (3rd Cir. 1980), it would not enforce a plea bargain under similar facts to those in Cooper.

The Third Circuit stated the facts in Cooper and Scotland were too similar to distinguish. With respect to the Third Circuit, it was wrong in this assessment. The facts were quite different.

In Cooper the state had made a clear and unequivocal offer for a plea bargain. This offer was accepted clearly and unequivocally. In Scotland, on the other hand, a crucial ingredient---testimony by the accused against his

co-defendants---was omitted from the bargain. When the government insisted he testify and the accused refused to do so, the agreement fell apart.

Thus, in Cooper there was full agreement. In Scotland there was not. This is a significant and determinative distinction.

Respondent's situation here is identical to that of the defendant in Cooper, and unlike that in Scotland.

The state here claims mistake in the original offer. Such a defense in a contract action among competent parties would be unavailing. Likewise, it should be here, particularly where constitutional principles are involved.

Given the divergent facts in Cooper, Scotland and here, it is obvious that the supposed split among the circuits is only a gloss. It does not exist.

Accordingly, the factual, usual and customary predicates for the possible grant of certiorari are missing---splits among the circuits in which the factual elements are identical.[2]

(B). Other Factual Considerations

As Santabello clearly indicates, each "plea bargaining" case must turn on its own facts. That was readily recognized by the Fourth Circuit in Cooper and the Eighth Circuit here.

There are other factual ingredients in this case, however, which make it rapidly distinguishable from Scotland, and even more compelling than Cooper.

First, respondent had already been convicted of other crimes arising out of the alleged accomplice murder from which the present case arises.

Second, there was strong evidence that respondent might not be convictable a second time on his murder charges: the finger-prints on the burglar's gun and on the window frame were entry

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[2] Respondents understanding of this Court's mission is that of deciding legal not factual questions. Here, however, a careful factual analysis would have to be undertaken before any legal analysis could be attempted.

was gained were not Johnson's; the Arkansas Supreme Court had once reversed his conviction, and the key witness against him---Mr. Siscoe---was dead.

Finally, the district court (magistrate) had found that respondent's appointed trial counsel had rendered ineffectiveness assistance during the very time (or shortly thereafter) when the plea bargain agreement was breached.[3]

3. Other Reasons

For at least three other reasons, this is not an appropriate case for certiorari.

First, the disposition of the case is controlled by this Court's precedent in Santobello. That decision was obviously intended---and was so interpreted by the Court of Appeals here---as a signpost to the future and not as a signal back to the unfortunate maze of past "no rights" instances when the state could cavalierly and whimsically give and withdraw its promises at will, as here it seeks to do claiming "mistake".

Second, because of the unique facts involved in this case, and because additional appellate review would be necessary even if the Court were to ultimately rule in petitioner's favor, the potential question proposed by the petition should be left to await a case which more clearly presents the proposed issue.

Finally, the decision below is the correct one when all of the circumstances are considered.

The facts of the case are 13 years stale. The original trial occurred 12 years ago, and the conviction which resulted from that trial was reversed 11 years ago.

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[3] The Court of Appeals specifically declined to reach the question of ineffectiveness in light of its holding that the plea bargain agreement had been breached. Thus, even if this Court determined this matter adversely to respondent, it would be necessary to remand the matter back to the Court of Appeals for consideration of this issue. Since the supposed split among the circuits is only superficial, and since no truly undecided federal question exists in light of Santobello, a remand of this case for a determination of proven ineffectiveness would be a total waste of the resources of the federal court system. Also a remand would only serve to further protract this matter, which has its genesis in 1970.

Subsequently---but still some 11 years ago---the state breached its plea bargaining arrangement with respondent.

Next, more than ten years ago, respondent pleaded guilty to a sentence twice as long as the original bargain contemplated. Moreover, this plea was made in the face of---now proven---ineffective assistance of counsel.[4]

Last, because of inherent delays, respondent has now served his enhanced sentence and is free on parole. Thus, his deserved victory in the Court of Appeals on one of his meritorious grounds is a paper victory if ever one existed---the state has already extracted from respondent a term of imprisonment based on the enhanced, but illegal, sentence.

4. Conclusion

For all of the reasons set out, this is not a proper case for plenary consideration by this Court. Certiorari should be denied.

Respectfully submitted,

RICHARD QUIGGLE
904 West Second Street
P.O.Box 2651
Little Rock, AR 72203

Attorney for Respondent

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[4] Respondent's uncontradicted evidence showed that he felt at the time he was not receiving the kind of representation he deserved. Rather than go to trial with his lawyer totally unprepared and face a possible life sentence, he agreed to an additional 21-year sentence. Upon remand, the Court of Appeals would have to decide if the proven ineffectiveness was deserving of some remedy.

CERTIFICATE OF SERVICE

I, Richard Quiggle, hereby certify service by mail on this 16th day of November, 1983, to the following:

Mr. Dennis Molock
Assistant Attorney General
Justice Building
Little Rock, AR 72201

RICHARD QUIGGLE

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IN THE
SUPREME COURT OF THE UNITED STATES

JAMES MABRY, COMMISSIONER,
ARKANSAS DEPARTMENT OF CORRECTION — PETITIONER

Vs. NO. 83-328

GEORGE JOHNSON — RESPONDENT

DEC 9 PAGE 1

MOTION TO PROCEED IN FORMA PAUPERIS

1. The undersigned is the attorney for respondent.

2. This case was brought by respondent in the U.S. District Court for the Eastern District of Arkansas in forma pauperis. The undersigned was appointed to represent respondent (then petitioner), pursuant to 187 U.S.C. §3006(a).

3. After the district court ruled against respondent, he appealed to the Court of Appeals for the Eighth Circuit, which again appointed the undersigned (as counsel for appellant there).

4. The State of Arkansas has now petitioned for a writ of certiorari in this Court. Respondent requests that the appointment of the undersigned and his status as a pauper be recognized by this Court.

RICHARD QUIGGLE
Attorney for Respondent
904 West Second Street
P. O. Box 2651
Little Rock, AR 72203

CERTIFICATE OF SERVICE

I, Richard Quiggle, hereby certify service by mail on this 23rd day of November, 1983, to the following:

Mr. Dennis Molock
Assistant Attorney General
Justice Building
Little Rock, AR 72201

RICHARD QUIGGLE

Office - Supreme Court, U.S.
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CLERK

CORRECTED COPY

In the

Supreme Court of the United States

October Term, 1983

No. 83-328

James Mabry, Commissioner, Arkansas Department of Correction ..... *Petitioner*

V.

George Johnson ..... *Respondent*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE PETITIONER

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By: ALICE ANN BURNS
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(501) 371-2007

Attorneys for Petitioner

QUESTION PRESENTED

IN THE ABSENCE OF A SHOWING OF DETRIMENTAL RELIANCE, AND PRIOR TO THE ENTRY OF A GUILTY PLEA, DOES A DEFENDANT HAVE A CONSTITUTIONAL RIGHT TO SPECIFIC PERFORMANCE OF A PLEA PROPOSAL WHICH WAS WITHDRAWN 72 HOURS AFTER IT WAS MADE DUE TO A MISTAKE ON THE PART OF THE PROSECUTING ATTORNEY?

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I. A CRIMINAL DEFENDANT IS NOT CONSTITUTIONALLY ENTITLED TO SPECIFIC PERFORMANCE OF A PROSECUTOR'S PLEA OFFER AFTER ACCEPTANCE BUT PRIOR TO THE ACTUAL ENTRY OF HIS PLEA OR ABSENT EVIDENCE OF DETRIMENTAL RELIANCE ON THE PLEA AGREEMENT 11

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In the

Supreme Court of the United States

October Term, 1983

No. 83-328

James Mabry, Commissioner, Arkansas Department of Correction ..... *Petitioner*

V.

George Johnson ..... *Respondent*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINION BELOW

The opinion of the Eighth Circuit Court of Appeals, dated May 6, 1983 is reported at 707 F.2d 323 (8th Cir. 1983). Petitioner's Petition for Rehearing En Banc was denied June 30, 1983.

JURISDICTION

Upon Motion by Petitioner, the Eighth Circuit Court of Appeals, by Order entered August 25, 1983, stayed issuance of the mandate until September 1, 1983. Prior to this latter date, a Petition for Writ of Certiorari was presented to this

Court, being submitted within 90 days of the June 30, 1983 denial of the Petition for Rehearing En Banc and thus was timely filed pursuant to 28 U.S.C. §2101. On December 12, 1983, this Court granted the Petition for Writ of Certiorari. This case presents for review the issuance of a writ of habeas corpus by the Eighth Circuit Court of Appeals pursuant to 42 U.S.C. §2254. The basis for this Court's jurisdiction is 28 U.S.C. §1254.

CONSTITUTIONAL PROVISIONS INVOLVED

The present case involves the Due Process Clause of the Fourteenth Amendment and, arguably, the Sixth Amendment right to the assistance of counsel.

United States Constitution, Amendment Six:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

United States Constitution, Amendment Fourteen, Section One:

> §1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On November 23, 1970, respondent George Johnson (respondent, Johnson) was convicted by a circuit court jury in Pulaski County, Arkansas of murder in the first degree and sentenced to a term of life imprisonment. [1] During the course of burglarizing the Little Rock, Arkansas, residence of W. A. Siscoe, Johnson and an accomplice were discovered inside by the occupants. An exchange of gunfire occurred resulting in the death of Vicki Siscoe. Mr. Siscoe and

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[1] At the time of this offense, murder in the first degree was punishable by life imprisonment. Ark. Stat. Ann. §§41-2205, 2227 (Repl. 1964, now repealed) These statutes have been repealed with the adoption of the Arkansas Criminal Code, effective January 1, 1976. Ark. Stat. Ann. §41-101 (Repl. 1977).

respondent were both wounded in the incident. [2] Based on charges arising out of the same incident involving W.A. Siscoe, Johnson was subsequently convicted of burglary

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[2] A more detailed summary of the facts appears in *Johnson v. State*, 252 Ark. 1113, 1114-1115, 482 S.W.2d 600 (1972):

> Mr. and Mrs. W.A. Siscoe and their daughter Vicki [footnote omitted] arrived home from the Siscoe grocery store on the night of May 22, 1970, at about 10:45 p.m. Mrs. Siscoe drove her vehicle into the driveway, parked it and awaited her daughter and husband, who followed her in a vehicle driven by the husband. He stopped his car and the daughter got out, opened the front door and entered the Siscoe dwelling. Her father heard her screaming inside the house and ran inside, armed with a .38-caliber revolver, where he became aware of the presence of an intruder who threatened to kill him and began firing a weapon. When Siscoe returned the fire, the intruder grabbed Vicki, swung her around as a body shield and a scuffle ensued during which Siscoe fired, or attempted to fire over the intruder's shoulder. Shots were fired by the father and by at least one intruder. In the exchange of gunfire, Vicki Siscoe was struck by a bullet from her father's weapon and another from a .22-caliber weapon obviously fired by the intruder. The state medical examiner testified that, in his professional opinion, Vicki's death was caused by a large caliber bullet of the same type as a .38-caliber slug exhibited to him. Both appellant, who admitted his presence in the house at the time, and W.A. Siscoe were wounded. All three wounded persons were admitted to Baptist Medical Center, where Vicki Siscoe died.

See, also, *Johnson v. Mabry, Commissioner*, 707 F.2d 323, 324 (8th Cir. 1983) where the State's evidence was summarized:

> **According to the evidence presented by the state, in May 1970 petitioner and Eddie Jackson broke into the house of W.A. Siscoe with the intent to commit burglary. Mr. and Mrs. Siscoe and their daughter Vicki arrived home in the middle of the burglary. Vicki was the first person to enter the house; she confronted the intruders and screamed. Mr. Siscoe heard Vicki's screams and entered the house. One of the intruders threatened to kill him and grabbed Vicki and used her to shield his escape from the house. At this point shots were exchanged by one of the intruders and Mr. Siscoe. Vicki was fatally wounded, and petitioner and Mr. Siscoe were wounded.**

and assault with intent to kill on June 15, 1971.[3] He was sentenced to a term of 21 years imprisonment on the burglary conviction and 12 years on the assault conviction, said terms to run concurrently. (App. 25) Respondent's first degree murder conviction was reversed by the Arkansas Supreme Court on July 17, 1972 for failure to give a requested jury instruction and the cause was remanded for a new trial. *Johnson v. State*, 252 Ark. 1113, 482 S.W.2d 600 (1972).

For purposes of retrial, the public defender was appointed to represent respondent. On Friday, October 27, 1972, prior to retrial, a deputy prosecuting attorney proposed to defense counsel, Harold Hall, a plea offer. In exchange for Johnson's plea of guilty, the deputy prosecutor would be willing to recommend a twenty-one year sentence to run concurrent with the time Johnson was serving on the burglary and assault charges. (App. 10, 19) (T. 62, Aug. 22, 1979 hearing transcript) On Saturday, the following day, defense counsel went to the penitentiary, met with Johnson and explained the terms of the proposal to him. Johnson indicated his willingness to accept the State's offer. (T. 62-63, Aug. 22, 1979 hearing transcript) On Monday, October 30, 1972, the next working day after the offer had been made, defense counsel called the deputy prosecutor and advised that respondent had accepted the offer to plead guilty for twenty-one years concurrent. The deputy prosecutor responded, however, that a mistake had been made, that the sentence could not be made concurrent but rather, would have to be consecutive to the previously imposed 21 year sentence. (T. 63, Aug. 22, 1979 hearing transcript) There is no indication in the record that this offer was accepted at

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[3]The burglary statute and the punishment imposed at the time of the offense may be found at Ark. Stat. Ann. §§41-1001, -1003 (Repl. 1964) (now repealed with the adoption of Arkansas Criminal Code, effective January 1, 1976. Ark. Stat. Ann. §41-101 (Repl. 1977)).

this time. Thereafter, Johnson's case was assigned to the chief deputy public defender, John Achor.

Respondent's case was set to be retried November 8, 1972. A jury was empaneled that date but a mistrial was declared November 9. (App. 10) Trial was rescheduled for December 7, 1972 then continued to February 26, 1973. On this latter date, Johnson appeared before the trial court and entered a plea of guilty to the charge of accessory after a felony murder.[4] Johnson was sentenced to a term of 21 years, said sentence to be served consecutive to the previously imposed 21 year sentence, resulting in a total of 42 years incarceration. (App. 10, 11)

Johnson sought to have his guilty plea set aside by seeking state post-conviction relief pursuant to Ark. R. Crim. P. 37, Ark. Stat. Ann., Vol. 4A (Repl. 1977). That relief was denied by the trial court July 14, 1977 whose decision was affirmed on appeal in an unpublished opinion rendered by the Arkansas Supreme Court June 5, 1978. (App. 7, 26)

Thereafter, on August 21, 1978, Johnson filed a petition for writ of habeas corpus (42 U.S.C. §2254) in the United States District Court, Eastern District of Arkansas. Johnson was permitted to amend his petition (T. 3, Aug. 22, 1979 hearing) ultimately claiming as grounds for relief ineffective assistance of counsel, mistake and coerced guilty plea. (App. 7, 26) Hearings thereon were held August 22, 1979, October 21, 1980 and December 11, 1980 before the United States Magistrate, Eastern District of Arkansas. On August 28, 1981, the magistrate entered his Report with Recommended Findings and Conclusions in which it was recommended that habeas corpus relief be denied. (App. 6-23) By Order and Judgment entered September 17, 1981, the United States District Court adopted the Magistrate's Findings and Conclusions. (App. 5, 6) As noted in the

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[4]Ark. Stat. Ann. §41-120, 121 (Repl. 1964, now repealed).

district court's written opinion, respondent raised the issue of the withdrawn plea offer as an additional constitutional challenge after the initial hearing in the case. (App. 20) The district court determined that respondent had exhausted available state remedies on the issue and considered the merits of Johnson's contentions. In its analysis of the issue, the district court noted that since the Supreme Court's decision in *Santobello v. New York*, 404 U.S. 257 (1971) the plea bargaining process must be attendant with fundamental fairness, and that subsequent caselaw has held that a defendant's right to enforce a plea bargain had been limited to instances in which a guilty plea had been entered. The district court rejected Johnson's argument premised on *Cooper v. United States*, 594 F.2d 12 (4th Cir. 1979), that he was entitled to specific performance of the withdrawn plea offer because of his expectations that the state would honor its offer. Rather, the district court followed the rationale of *Government of Virgin Islands v. Scotland*, 614 F.2d 360 (3rd Cir. 1980). By extensively quoting from *Scotland*, the district court held that Johnson's sixth amendment right to effective assistance of counsel had not been abridged, that the holding in *Cooper* invaded the province of prosecutorial discretion in the plea bargaining process and that, once the offer was withdrawn, Johnson's right to a jury trial on the murder charge provided an adequate alternative remedy for any alleged breach of agreement by the prosecutor in the context of the present case. (App.6-23)

On appeal to the Eighth Circuit Court of Appeals, the district court's decision dismissing the habeas corpus petition was reversed and the cause remanded with directions to grant the writ of habeas corpus unless the state resentenced Johnson in accord with the concurrent sentence plea proposal within 120 days of the date of the appellate opinion. *Johnson v. Mabry*, 707 F.2d 323 (8th Cir. 1983). The Court of Appeals held that the *Cooper* analysis should be followed, noting that it required the government to honor the terms of its proposed plea offer if they are promptly and unequivocally accepted by a defendant. The

appellate court recognized that the facts here fell short of a plea bargain and noted that Johnson had not entered a plea in open court nor had he relied upon the plea bargain by performing any specific action. It was determined, however, that Johnson had relied "on the plea proposal to the extent that he considered the terms offered, agreed to accept the plea proposal and communicated his willingness to plead guilty to the prosecuting attorney." *Id.* at 328. (App. 33) Specifically, the Court of Appeals found that prosecutorial discretion in the plea bargaining process was not restricted by the *Cooper* analysis and that a jury trial was not an adequate remedy under the circumstances. (App. 24-41)

Petitioner herein sought rehearing en banc which the Court of Appeals denied by Order entered June 30, 1983.

Subsequently, this Court granted petitioner's request for certiorari to review the decision of the Eighth Circuit Court of Appeals.

SUMMARY OF ARGUMENT

The concept of fundamental fairness is inherent in the plea bargaining process. A defendant, however, has no right to specific performance of a plea proposal unless he has plead guilty or otherwise relied to his detriment on the plea agreement. *Santobello v. New York*, 404 U.S. 257 (1971) and its interpretive caselaw support this principle.

The State should not be bound to the terms of a plea offer which has merely been accepted by a criminal defendant absent a change in circumstances to the defendant's detriment. In the present case, the prosecuting attorney's plea offer was premised on a mistake, that is, a term of 21 years concurrent was offered instead of a term of 21 years consecutive. Although the respondent accepted the plea offer, the State should not be ordered to specifically perform the terms of the agreement. The record does not indicate the State was unscrupulous in its dealings with Johnson. In the context of the present case, a concurrent sentence would essentially mean that Johnson would serve no time for the murder of the victim. A plea offer should be made in consideration of a criminal defendant on an individual basis and the crime committed.

The State should not be held to an unwise bargain on the premise that, once an offer is made, the defendant's expectations that the government will honor its promises should be fulfilled. Such a premise encourages a rigid rule to be adopted in determining whether plea negotiations should be enforced, thereby precluding a prosecutor's discretion in such matters. Plea bargaining flows from "mutuality of advantage" on the part of the prosecuting attorney and the criminal defendant. The process contemplates fairness to both parties and thus an inflexible rule would defeat this recognized goal.

Defense counsel is not rendered ineffective because the State is permitted to withdraw a plea offer based on an

honest mistake. In Arkansas, any plea agreement made at the time here was subject to the approval of the trial court.

Even though a plea offer has been withdrawn, as here, the defendant is still afforded an adequate remedy since his right to a jury trial remains intact. This is so because the defendant is presumed innocent, has not openly admitted his guilt to the crime and has not otherwise exposed himself or others to criminal liability.

The facts of this case do not include prosecutorial abuse or harrassment in the plea bargaining process. Any effort to curb potential prosecutorial misconduct by advancing a rigid rule that an accepted plea proposal, without more, should be enforced, is not warranted and defeats the goal of fundamental fairness.

ARGUMENT

I.

A CRIMINAL DEFENDANT IS NOT CONSTITUTIONALLY ENTITLED TO SPECIFIC PERFORMANCE OF A PROSECUTOR'S PLEA OFFER AFTER ACCEPTANCE BUT PRIOR TO THE ACTUAL ENTRY OF HIS PLEA OR ABSENT EVIDENCE OF DETRIMENTAL RELIANCE ON THE PLEA AGREEMENT.

This Court has recognized that the plea bargaining process is an important component of the criminal justice system. *Brady v. United States*, 397 U.S. 742 (1970); *Boykin v. Alabama*, 395 U.S. 238 (1969); *Blackledge v. Allison*, 431 U.S. 63 (1977). Since this Court's decision in *Santobello v. New York*, 404 U.S. 257 (1971)[5] fairness in plea bargaining has been viewed as having constitutional dimensions. *Santobello* and its interpretative caselaw indicate that a defendant's reliance upon a plea proposal is a necessary prerequisite to specific performance of the alleged plea agreement. The State of Arkansas herein was ordered to provide specific performance of a plea agreement absent entry of a guilty plea or other detrimental reliance by the defendant. Petitioner asserts that this holding by the court below in reliance on *Cooper v. United States*, 594 F.2d 12 (4th Cir.

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[5]In *Santobello v. New York*, 404 U.S. 257, 261 (1971) this Court indicated that properly administered plea bargaining is to be encouraged. The Court discussed the desirable benefits of the process as follows:

> It leads to prompt and largely final disposition of most criminal cases; it avoids much of the corrosive impact of enforced idleness during pretrial confinement for those who are denied release pending trial; it protects the public from those accused persons who are prone to continue criminal conduct even while on pretrial release; and, by shortening the time between charge and disposition, it enhances whatever may be the rehabilitative prospects of the guilty when they are ultimately imprisoned. See *Brady v. United States*, 397 U.S. 742, 751-752 (1970).

1979) has extended the rationale of *Santobello* to an extreme not constitutionally mandated by the concept of fundamental fairness.

In *Santobello*, the assistant district attorney agreed to make no recommendation with regard to sentencing in exchange for the accused entering a plea of guilty. After acceptance of the defendant's guilty plea, sentencing was set for a later date. A different judge presided at the subsequent sentencing hearing. Likewise, a new prosecutor appeared and recommended that the one-year maximum sentence be imposed, which it was. In ordering that the defendant was entitled to relief, this Court wrote: "When a plea rests in significant degree on a promise or agreement of the prosecutor so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." 404 U.S. at 262. Thus, although an accused has no right to have a guilty plea accepted, once an agreement is reached and the accused enters a guilty plea or relies to his detriment upon the terms of the agreement, the prosecutor is bound to fulfill the terms of the agreement.

In rendering the decision below the Eighth Circuit Court of Appeals abandoned the rationale of *Santobello*, as did the Fourth Circuit in *Cooper v. United States*, 594 F.2d 12 (4th Cir. 1979), on which the Eighth Circuit relied. In overturning the decision of the district court, the Eighth Circuit Court of Appeals acknowledged that the plea proposal (21 years concurrent) was conveyed to Johnson's counsel on Friday; that on the following Monday, defense counsel attempted to accept the plea proposal; that the prosecuting attorney indicated a mistake had been made and the sentence must be consecutive rather than concurrent; that Johnson did not enter a plea of guilty in reliance on the proposal; and that Johnson had not performed any specific action in reliance upon the proposal. See (App. 25-26, 31-33) Although expressly rejecting the rigid applicability of contract law principles, the Eighth Circuit Court of Appeals found that Johnson had relied upon the plea proposal to the

extent that he had considered the terms offered, agreed to accept the proposal and communicated his willingness to plead guilty to the prosecuting attorney. See (App. 31-33)

Likewise in *Cooper*, the government attorney's plea proposal was made and withdrawn on the same date as the attempted acceptance by defense counsel. [6] Noting that the Court in *Santobello* emphasized fairness in the plea bargaining process, the Fourth Circuit indicated, however, the source and right of the fairness concept was not identified other than as being of constitutional origin. Even though Cooper had not entered a plea or performed any other obligation contained in the proposal, the Court of Appeals held that under appropriate circumstances a constitutional right to enforce a plea proposal may arise before any technical "contract" right has been formed, and on the basis of expectations reasonably formed in reliance upon the

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[6] *Cooper v. United States, supra* was an appeal from convictions on two counts of bribing a witness in which error was claimed in the district court's refusal to enforce the government's plea proposal.

Cooper had become an informant for the government. He offered to remove himself as a witness against one Simpson for $10,000 and further agreed to flee to Mexico. Phone calls between Cooper and Simpson were recorded resulting in Cooper's arrest.

Around 11 a.m. on May 11, 1977, two months before Cooper's trial, the government's attorney proposed the following plea agreement, to wit, (1) Cooper would be removed from the witness protection program; (2) Cooper would remain incarcerated; (3) he would continue to cooperate with federal authorities; (4) he would plead guilty to one count of obstruction of justice; and (5) he would present testimony on three occasions in on-going trials involving narcotics violations.

Cooper was immediately advised of the proposal by defense counsel, and agreed. Defense counsel attempted to contact the government's attorney around noon but was unsuccessful. Around 1:30 p.m. the United States attorney advised his assistant to withdraw the offer. When defense counsel and the assistant made telephone contact between 2:30 and 3:30 p.m., Cooper's counsel was advised at the outset that the offer had been withdrawn. 594 F.2d at 13-14, 15.

honor of the government. 594 F.2d at 18. Not only did *Cooper* identify a new "right", it further identified two sources of that right, to wit, (1) the right to fundamental fairness embraced in substantive due process and (2) the Sixth Amendment right to effective assistance of counsel. Although due process was not explicitly discussed because its applicability was too plain, 594 F.2d at 18, effectiveness of defense counsel was determined to come into play on the theory that a defendant's confidence in his attorney's capability and professional responsibility may be jeopardized when the government attempts, through defense counsel, to change or retract a proffered plea agreement. The Fourth Circuit held that Cooper was entitled to have the plea offer specifically enforced since a specific, unambiguous and not unreasonable proposal should be accepted based on constitutional fairness if a defendant promptly accepts and extenuating circumstances previously unknown have not intervened.[7]

Petitioner contends that the *Cooper* analysis and the rationale of the Court of Appeals below are not consistent with the decision in *Santobello* and later caselaw. Petitioner's assertion is supported by the Third Circuit's out-

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[7]The Fourth Circuit listed a number of factors which led it to conclude that Cooper's counsel had been rendered ineffective because of the government's failure to honor the plea proposal: (1) the proposal was specific and unambiguous in form and made without reservation related to a superior's approval or otherwise; (2) the content of the proposal was reasonable in context; (3) the proposal was made by a prosecutor with apparent authority at the time; (4) the proposal was promptly communicated to the defendant and thus no question of staleness was presented; (5) Cooper assented promptly and unequivocally to its terms, indicated his assent to counsel and was entitled to assume that when acceptance was communicated to the government, the plea agreement would be consummated; (6) within hours, defense counsel communicated acceptance to the government but by "sheer fortuity" was told of the withdrawal before actual acceptance could be communicated; and (7) the reason for withdrawal did not concern any intervening government or public interest unknown at the outset but lay "simply" in a superior second-guessing a subordinate. *Cooper v. United States*, 594 F.2d at 19.

right rejection of *Cooper* in the subsequently decided case of *Government of the Virgin Islands v. Scotland*, 614 F.2d 360 (3rd Cir.1980). In reviewing what the Third Circuit considered to be facts so similar as those in *Cooper* that alleged distinctions were "specious", 614 F.2d at 363, note 5, the appellate court refused to order specific performance of an unconsummated plea agreement absent detrimental reliance by the defendant. [8] In other words, specific performance of a prosecutor's plea offer is required only when a defendant has plead guilty or can establish that he detrimentally relied on the prosecutor's promise to such an extent that a fair trial is no longer possible. The *Scotland* Court rejected *Cooper's* indication that defense counsel could be rendered ineffective by an unconsummated plea bargain absent detrimental reliance, noting that (1) no plea offer may be made at all and (2) the proper focus of this issue is on defense counsel's performance and not defendant's perception of it. 614 F.2d at 363. In reaching its ultimate conclusion of refusing to specifically enforce the plea offer, *Scotland* held that binding the prosecutor to his original offer, under the circumstances, interfered with prosecutorial discre-

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[8] In *Scotland*, the facts indicated that on November 3, 1978, Springette, a co-defendant with Scotland, was charged with two counts of burglary and two counts of grand larceny (78-219). In two other cases pending against Springette, the charges were grand larceny and buying and receiving stolen property (78-147) and third degree burglary (78-200).

After arraignment on November 11, 1978, where Springette plead not guilty, the Assistant United States Attorney offered the following plea bargain, *viz.*, Springette would plead guilty to third degree burglary (78-219) or in the other charge (78-200) and to a misdemeanor in 78-147. The government's position on sentence recommendation would depend on Springette's willingness to testify against Scotland in 78-219. The proposal was communicated by defense counsel to Springette who agreed to plead guilty in 78-200 and 78-147 if 78-219 was dismissed. Springette refused to testify for the government in 78-219. Upon learning of Springette's acceptance, the Assistant United States Attorney added another condition. Springette sought to have the initial plea proposal enforced and the district court refused. *Government of Virgin Islands v. Scotland*, 614 F.2d at 361-362.

tionary functions. 614 F.2d at 364-365. The most compelling reason for the result reached in *Scotland*, however, was that the defendant's right to jury trial as an available alternative remedy remained intact upon the prosecutor's withdrawal of the plea offer. 614 F.2d at 365.

Both prior to *Cooper* and *Scotland* as well as subsequent thereto, several courts have rendered decisions on the issue presented for this Court's review. The great weight of authority is to the effect that a state or government prosecutor should not be bound by the initial plea proposal, whether accepted or not, unless the defendant has entered his plea of guilty or taken some action in detrimental reliance thereon. Caselaw indicates that other courts

consider this the appropriate rationale to be followed in light of *Santobello v. New York, supra.* [9]

Petitioner urges this Court to resolve the conflicting holdings indicated by the decisions of the Fourth and Eighth Circuits and the decision of the Third Circuit by adopting the rationale of what appears to be the greater weight of authority and the better rule of law. Analyzing the facts of the instant case in terms of the reasoning announced in these conflicting opinions demonstrates peti-

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[9]Consider: *State v. Wheeler*, 95 Wash. 2d 799, 631 P.2d 376 (1981) (plea proposal offered by prosecutor withdrawn either before or after acceptance after interviews with witnesses and reaction by victim's family; *Cooper* analysis rejected, noting no constitutional right to plea bargain; citing *Weatherford v. Bursey*, 429 U.S. 545 (1977); enforcing bargain before plea entered would inhibit prosecutor's use of plea bargaining and defendant has adequate remedy since has right to jury trial); *Commonwealth v. Smith*, 427 N.E.2d 739 (Mass. 1981) (prosecutor offered plea proposal as "package deal" to defendant and co-defendant, but co-defendant refused and both went to trial; co-defendant ultimately plead guilty and defendant was convicted but sought to enforce plea proposal; test for whether there was an enforceable promise was whether defendant had reasonable grounds for interpretation of the bargain and whether defendant relied on prosecutor's promise to his detriment; opinion indicates prosecutor's promise can be enforced on promise of fundamental fairness but would not go as far as *Cooper* absent detrimental reliance since defendant has adequate remedy in jury trial); *People v. Barnett*, 113 Cal. App. 3d 563, 170 Cal. Rptr. 255 (1981) (prosecutor made package plea proposal to defendant and co-defendant, the latter refused and trials were severed; defendant tried and convicted, co-defendant plead guilty; decision held no due process rights violated because co-defendant received "better deal"; *Scotland* rationale followed finding that due process is satisfied if defendant is permitted to go to trial); *State v. Collins*, 300 N.C. 142, 265 S.E.2d 172 (1980) (written plea agreement entered by defense counsel and assistant district attorney; another district attorney refused to honor plea bargain on grounds it was inappropriate to severity of charges; decision rejected *Cooper* rationale and found weight of authority to effect that State may withdraw from plea bargain at any time prior to, but not after, the actual entry of guilty plea by defendant or any change in position by him constituting detrimental reliance on the agreement; further, state law requires judicial approval and lack thereof renders agreement null and void); *State v. Beckes*, 100 Wis. 2d 1, 300 N.W.2d 871 (1980) (plea offer accepted by defendant but

withdrawn by prosecutor prior to actual entry of plea; *Cooper* analysis rejected; opinion held that state may withdraw from plea bargain prior to defendant's entry of guilty plea or prior to other action taken by defendant to his detriment, relying on *Scotland* and weight of authority; defendant exercised right to jury trial and made no claim that prosecutor abused his discretion and withdrew offer as means to test will of defendant); *State v. Edwards*, 279 N.W.2d 9 (Iowa, 1979) (offer made by prosecutor accepted by defendant but offer withdrawn prior to entry of plea on grounds that another assistant had decided to file on original felony charge; opinion rejects *Cooper* rationale finding that *Santobello* cannot logically be extended to require specific performance of plea proposal where defendant has neither plead guilty nor detrimentally relied on agreement); *State v. Reasbeck*, 359 So.2d 564 (Fla. App. 1978) (plea agreement reached but offer withdrawn prior to entry of guilty plea; lower court held to have impermissibly ordered specific performance where state law provides that the plea negotiations are not binding until formally accepted by trial judge and until then, offer can be withdrawn by either party; defendant here had not relied to his legal detriment on mere offer of the State); *State ex rel Gray v. McClure*, 242 S.E.2d 704 (W. Va. 1978) (prosecutor and defendant reached plea agreement which was approved by trial judge; new prosecutor elected and case transferred to new judge; new prosecutor refused to honor agreement; opinion indicated state not bound to terms of inchoate plea agreement where defendant has not plead guilty or otherwise relied to his detriment; cause remanded to develop record on whether defendant had relied to his detriment); *People v. Heiler*, 79 Mich. App. 714, 262 N.W.2d 890 (1978) (plea bargain offered and accepted by defendant; prior to entry of guilty plea, offer withdrawn by prosecutor on grounds it was contrary to charging policy, trial court's order reinstating plea agreement set aside on appeal, noting that *Santobello* and its progeny require specific performance only after plea of guilty entered and defendant has been prejudiced by prosecutor's failure to perform; prosecutor should not be bound by unwise plea agreement especially where defendant has not been prejudiced); *Shields v. State*, 374 A.2d 816 (Del. 1977) cert. denied 434 U.S. 893 (1977) (plea offer by attorney general communicated to defendant but unilaterally withdrawn several weeks later; opinion held that bargain was not enforceable since defendant had not plead guilty or detrimentally relied, citing weight of authority; defendant was unable to substantiate his claim that the government had gained valuable information by the plea agreement).

Compare, *U.S. v. Society of Independent Gasoline Marketers*, 624 F.2d 461 (4th Cir. 1980) (citation to *Cooper*, but conclusion reached that defendant relied on promise of immunity); *United States v. McIntosh*, 612 F.2d 835 (4th Cir. 1979) (*Cooper* distinguished; offer made by state prosecutor held not binding on federal prosecutor, thus no binding agreement).

tioner's position that the interests recognized and sought to be protected in the plea bargaining process as announced in *Santobello v. New York*, 404 U.S. 257 (1971) are best served by adhering to the concept that the State is not bound by a plea agreement until the accused enters a guilty plea or otherwise relies to his detriment on the government's plea proposal.

Johnson's original murder conviction was reversed and remanded for new trial on July 17, 1972. (App. 7, 25) *Johnson v. State*, 252 Ark. 1113, 482 S.W.2d 600 (1972). On August 21, 1972, he appeared for arraignment on the murder charge. (App. 4) A period of six months passed from the date of respondent's arraignment until he ultimately entered a plea of guilty to the charge of accessory after felony murder. During this six month period Johnson, for 72 hours, was placed in the position of having his psychological expectations center around a plea proposal that was based on an honest mistake made by a deputy prosecuting attorney. Although the decision of the court below relied heavily on the duty of the government to negotiate with scrupulous fairness, there is nothing in the opinion nor in the record to indicate the state in the present case was anything but scrupulous. The evidence tended to establish only that an honest mistake had been made by the prosecutor. Thus, this is not a case in which the prosecutor abused his discretion by revoking an otherwise acceptable plea proposal to test the will of the defendant regarding his guilt or desire to be retried. [10]

It should not be forgotten that Johnson had previously been convicted of first degree murder and sentenced to life imprisonment. He had likewise been convicted of burglary and assault with intent to kill a second victim in connection

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[10] See, e.g., *State v. Beckes*, 100 Wis. 2d 1, 300 N.W.2d 871 (1980), n. 9 supra. In holding that the State could withdraw the plea proposal, it was noted that the defendant made no claim that the offer was withdrawn to test the will of the defendant.

with the same incident, for which he was serving twenty-one years. The State's desire to judicially economize by seeking to forego the expense of retrial while at the same time vindicate the interests of the public by seeking appropriate punishment for the person responsible for these crimes was not unreasonable. Thus, the plea offer should be made in consideration of a criminal defendant on an individual basis in terms of the sentence imposed compared to the crime committed. [11] In the context of the present case, 21 years concurrent with time already being served is disproportionate not only to the defendant herein who had two prior felonies, but also to the heinous nature of the crime itself, murder of a young girl as she was being used as a shield by one of the intruders in her family's home during the course of a burglary. The right to expect that the government will honor its promises not only extends to the defendant but the public at large of which the defendant and the Siscoe family are members. Were the mistaken plea proposal thus enforced here, Johnson in effect would serve no time for the murder of Vicki Siscoe.

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[11] See, *Corbitt v. New Jersey*, 439 U.S. 212, note 14 (1978); See also, *Corbitt v. New Jersey*, 439 U.S., at 231-232, Stevens, J., dissenting.

In *Government of the Virgin Islands v. Scotland*, 614 F.2d 360 (3rd Cir. 1980) the Third Circuit stated that binding the prosecutor to his original plea offer was an interference with his discretionary functions, "i.e., determining what he feels is fairest in light of the defendant's circumstances, the government resources, and the statute involved." Id. at 364. In note 13 cited to this quoted passage, the Third Circuit cited *Bordenkircher v. Hayes*, 434 U.S. 357 (1978) in recognition of this Court's reluctance to interfere in prosecutorial charging matters and plea bargaining. The additional cite in note 13 is omitted. 614 F.2d at 364-65.

The *Scotland* Court determined the role of the prosecutor had at least four possible functions:

> (1) to act as an administrator and dispose of cases in the fastest, most efficient manner; (2) to act as an advocate for the state to maximize convictions and severity of sentences; (3) to judge the individual's social circumstances and ensure fairness; (4) to act as a quasi-legislator, granting concessions because the law is too harsh. [11] Citing, at n. 11, See *Alschuler, The Prosecutor's Role in Plea Bargaining*, 36 U.Chi.L.Rev. 50, 52-53 (1967) Id. at 364.

Besides the obvious fact that an unwise bargain will be struck, holding the prosecutor to his admitted honest mistake in the present case precludes the exercise of discretion inherent in the office the prosecutor holds on behalf of the people of the state of Arkansas. [12] Acknowledging a prosecutor's wide degree of discretion this Court recently held that due process was not violated by a prosecutor's threat to a defendant to seek a second indictment and thereby expose him to a more severe punishment if that defendant did not plead guilty to the initial charge, saving the court inconvenience and necessity for trial. *Bordenkircher v. Hayes*, 434 U.S. 357 (1978). Recognizing that plea bargaining flows from "mutuality of advantage" [434 U.S. at 363], this Court rejected the notion of "a rigid constitutional rule that would prohibit a prosecutor from acting forthrightly in his dealings with the defense [since it] could only invite unhealthy subtrefuge that would drive the practice of plea bargaining back into the shadows from which it has so recently emerged." 434 U.S. at 365. Citing *Blackledge v. Allison*, 431 U.S. 63, 76 (1977).

Just such a "rigid rule" is encouraged by the Eighth Circuit in the instant case as well as by the Fourth Circuit in *Cooper* if the State is held to the terms of the plea offer mistakenly made to Johnson. Although the Eighth Circuit Court of Appeals discounted the utility of contract prin-

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[12] In Arkansas, the qualified electors of each judicial circuit shall elect a prosecuting attorney whose term of office is two years. Ark. Const. Art. 7, §24. Prosecutions are sought on behalf of the State of Arkansas. Ark.R.Crim.P. 1.5, Ark. Stat. Ann. Vol. 4A (Repl. 1977).

ciples in reaching its result in the case at bar, [13] the contract analogy was manifestly applied when that court held that the defendant demonstrated reliance by hearing the pro-

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[13] In announcing its holding to follow the *Cooper* rationale, the Eighth Circuit appeared to reject any analogy to contract principles. In so doing it stated:

> 'Plea bargaining involves more than commercial law. Because the entry of a guilty plea constitutes a waiver of fundamental constitutional rights, *Santobello v. New York*, 404 U.S. at 264 (Douglas, J., concurring), plea bargains are not just contracts in which the prosecution exchanges the dismissal or reduction of charges and recommendations on sentencing for the defendant's guilty plea. Imposing on the government the duty to conduct plea bargaining with scrupulous fairness, which, in the present case, would require the government to honor the terms of its plea proposal, is consistent with the "fairness" requirement set forth in *Santobello*. As noted in *Cooper*, "constitutional decisions cannot be made to turn in favor of the government on the fortuities of communications or on a refusal to accord any substantive value to reasonably induced expectations that government will honor its firmly advanced proposals. 594 F.2d at 17.' *Johnson v. Mabry*, 707 F.2d at 329.

posal, considering it and then accepting it. [14] Such a result is too rigid and mechanical in application. The goal of plea bargaining announced in *Santobello* was fundamental fairness, not technical precision.

Petitioner agrees with the principle that the state prosecutor and his subordinates must keep each other informed regarding the plea bargaining process and further, should strive to organize that procedure so that plea negotiations are fairly conducted and scrutinized in order to preclude their arbitrary and inconsistent use. These ideals, however, must be considered within a proper framework in order to assess their practical utility, *viz*, the day-to-day volume of business handled in the many prosecutors' offices

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[14] The Eighth Circuit stated:

"The analogy between contracts and plea agreements works well in the usual plea bargain case, which involves the entry of a guilty plea, or the performance of some other action, following plea negotiations and an agreement about specific terms. *E.g., United Stats v. Runck*, 601 F.2d 968, 980 (8th Cir. 1979) (on petition for rehearing) (following entry of negotiated plea, dispute arose over whether part of sentence was within plea agreement accepted by district court). Traditional contract principles, however, are of little guidance in a plea proposal case like the present one. Here, as in *Cooper* and *Scotland*, we are confronted with a fact situation that falls short of a plea bargain. Petitioner did not enter a plea of guilty in court and has not performed any specific action in reliance upon the plea bargain. *Compare Palermo v. Warden*, 545 F.2d 286, 290 (2d Cir. 1976) (defendants offered reduced sentences and early parole in exchange for return of stolen jewelry); *see United States v. Bowler*, 585 F.2d 851, 852 (7th Cir. 1980) (plea agreement provided for dismissal of counts and recommended sentence if defendant cooperated in further prosecutions and other investigations). However, petitioner did rely on the plea proposal to the extent that he considered the terms offered, agreed to accept the plea proposal and communicated his willingness to plead guilty to the prosecuting attorney." (footnotes omitted)

Johnson v. Mabry, 707 F.2d at 327-328 (8th Cir. 1983)

not only in Arkansas but also throughout the country. [15] Statistics show that plea bargaining disposes of the majority of criminal cases brought through the different jurisdictions of the United States. [16] Tying up the plea bargaining process by requiring adherence to a rigid set of guidelines

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[15]The Fourth Circuit in *Cooper* found paramount the defendant's right to enforce a plea proposal based on his expectations reasonably formed that the government will honor its proposals. *Cooper v. United States*, 594 F.2d at 18. By comparison, the burden on the government was determined to be minimal in efforts that could be undertaken to ensure that a defendant is not disappointed, viz, plea negotiations must be entered into by an authorized agent of the government; government agencies must keep officials informed of the progress of plea bargaining; the government can delineate the precise line of authority of its agents; the government can "incorporate reservations relating to higher level approval routinely in all proposals or specially in some," and routinely require plea proposals be documented by signed memoranda. Id. at 20.

Along the same vein, the Eighth Circuit Court of Appeals suggested that conditional proposals could be made and that the government could withdraw or modify offers that have been made but not yet accepted or rejected after a reasonable period of time. Generally, it was suggested that the government become better organized and engage in in-house scrutiny of plea proposals before they are discussed with defense counsel. *Johnson v. Mabry*, 707 F.2d at 330.

[16]See, e.g. In the United States District Courts, out of a total of 35,391 defendants convicted and sentenced, 29,814 plead guilty and 709 entered pleas of nolo contendre. Source: Detailed Statistical Tables, Annual Report of the Director of the Administrative Office of the United States Courts for the twelve month period ending June 30, 1983.

In the United States District Courts, figures for the fiscal year 1972, reflect that 39,587 defendants were convicted and sentenced. Of those, 33,677 entered pleas of guilty or nolo contendre.

In the United States District Courts, figures for the fiscal year 1973 reflect that 37,261 defendants were convicted and sentenced. Of these, 30,852 entered pleas of guilty or nolo contendre.

Source: Annual Report of the Director of the Administrative Office of the United States Courts, 1970-1979, Criminal Statistical Tables, Table D-7.

to be kept in every case would be counterproductive to this Court's announced recognition that expediting disposition of criminal cases benefits not only the defendant but the public as well. [17]

Petitioner suggests that due to the sheer volume of criminal prosecutions, it is unreasonable to suggest that all plea proposals not only be reduced to writing but also that supervisory approval of plea proposals be gained before they are formally submitted to defense counsel. Equally unreasonable is the suggestion that only specific prosecutors have plea bargaining authority since virtually all criminal prosecutions possess the potential to be expedited by plea negotiations.

Placing constraints on a subordinate prosecutor's authority in making a plea offer, in the context of the present case, still would not prevent a deputy prosecutor from making an honest mistake in the initial plea offer. In other words, strict policy rules defining the circumstances under which a plea offer can be made will not prevent a newly hired deputy prosecutor from being nervous when making a

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[17] *Santobello v. New York*, 404 U.S. 257, 261 (1971), Note 1, supra.

In *Brady v. United States*, 397 U.S. 742, 752 (1970) the mutuality of advantage inherent in the plea bargaining process was discussed as follows:

> For a defendant who sees slight possibility of acquittal, the advantages of pleading guilty and limiting the probable penalty are obvious – his exposure is reduced, the correctional processes can begin immediately, and the practical burdens of a trial are eliminated. For the State there are also advantages – the more promptly imposed punishment after an admission of guilt may more effectively attain the objectives of punishment; and with the avoidance of trial, scarce judicial and prosecutorial resources are conserved for those cases in which there is a substantial issue of the defendant's guilt or in which there is substantial doubt that the State can sustain its burden of proof. [footnote omitted]

plea proposal and confuse the terms consecutive with concurrent. Nor will it prevent an experienced prosecutor, even with supervisory authority, from making a slip-of-the-tongue in his usage of the words concurrent and consecutive on a busy Friday afternoon. Thus, it is one matter to hold that the government should honor its promises made to criminal defendants who have explicitly taken action in reliance thereon. But extending that rationale to the extreme as here, imposes on the government and its prosecutorial agents a higher, if not impossible standard, that when they negotiate a plea proposal they not only must be scrupulous but perfect as well.

The thrust of both the *Cooper* opinion and especially the opinion below was to place blame and responsibility on the government for what these courts concluded was an unfortunate situation for the respective defendants created at the hands of the government. Both courts believed themselves constrained to take the position they did in order to curb the potential abuse by prosecutors who allegedly take advantage of defendants. [18] In this regard, the record before this Court, as previously indicated, contains no evidence that the prosecutor intentionally misled Johnson, impermissibly tested his will so as to examine the strength of Johnson's guilt or innocence, or otherwise abused the plea bargaining process. A case of prosecutorial abuse could have been presented here had the deputy pro-

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[18] The *Cooper* Court appeared concerned with indiscriminate withdrawals of plea proposals even though the record did not indicate free withdrawal of plea proposals to "test the wills and confidence of defendants" or to deliberately harass them. It stated that it must recognize, however, "that our failure to find constitutional right and violation in this case would necessarily give judicial approval to a practice whose possibilities for easy abuse, or at least the appearance of abuse, are abundantly clear." *Cooper v. United States*, 594 F.2d 12, 20.

The Eighth Circuit Court of Appeals was likewise unable to find prosecutorial abuse in the circumstances at hand. *Johnson v. Mabry*, 707 F.2d 323, 330 (8th Cir. 1983).

secutor, upon learning of Johnson's acceptance of 21 years concurrent, advised defense counsel that the mistake was that of defense counsel's, contending the offer made was 21 years consecutive. Such was not the case here since the deputy prosecutor admitted his mistake and by doing so dealt forthrightly with the defendant, thus keeping the plea bargain here from reverting back to the shadows. *Bordenkircher v. Hayes*, 434 U.S. at 365.

When the State's plea offer was withdrawn, Johnson reassumed the identical posture he occupied the preceding Friday before any offer was made, i.e., he faced retrial by jury on a charge of first degree murder. The record is void of evidence which would tend to indicate that during this 72 hour period, Johnson in any way relied on the proposal to his detriment or otherwise changed his position to the extent that he would not evenually be tried fairly. The plea offer was withdrawn October 30, 1972. Johnson's trial commenced November 8 but a mistrial was declared November 9. The rescheduled trial date of December 7, 1972 was continued until February 26, 1973. On this date, Johnson admitted his guilt in open court to the crime of accessory after a felony murder and was sentenced to a term of 21 years to be served consecutively to his previously imposed sentences.

Petitioner notes that the district court made an independent finding that defense counsel was ineffective in his representation of Johnson. That finding, however, was not connected in any fashion to the withdrawn plea offer. Rather, that conclusion was based on defense counsel's failure to attempt to locate and interview Eddie Jackson, Lacy Gordon and Benny Kelley. The district court concluded, however, that Johnson had failed to establish prejudice from defense counsel's omissions. (App. 15-18) Thus, nothing in the opinion of the Eighth Circuit Court of Appeals indicated that the change in the proposed plea agreement in the present case resulted in either a loss of confidence in the accused's attorney or in any way hindered defense counsel in his ability to defend Johnson.

Under Arkansas law, in effect at the time, the trial court was under no obligation to accept a negotiated plea or adhere to any sentencing recommendation made to Johnson by the prosecuting attorney. *Meyers v. State*, 252 Ark. 367, 369, 479 S.W.2d 238 (1972). [19] Thus, it is illogical to hold that defense counsel is rendered ineffective by the State's withdrawal of a mere offer to plead when at the time, any negotiated plea agreement was subject to being rejected by the trial court. The proper focus should be on defense counsel's performance presumably in attempting to negotiate a plea agreement with the government, not on the fact that a plea offer has been withdrawn by the State before the defendant enters a plea of guilty. In accord, *Government of the Virgin Islands v. Scotland*, 614 F.2d 360, 363 (3rd Cir. 1980); *State v. Beckes*, 100 Wis. 2d 1, 300 N.W.2d 871 (1980) (argument that counsel is rendered ineffective, not supported by logic; defendant may lose faith when plea agreement is not accepted by the court and attorneys should advise clients that plea bargain may not come to fruition); *State v. Collins*, 300 N.C. 142, 265 S.E.2d 172 (1980) (State law requires judicial approval; otherwise plea bargain null and void); *State v. Reasbeck*, 359 So.2d 564 (Fla. App. 1978) (same); *People v. Heiler*, 79 Mich. App. 714, 262 N.W.2d 890 (1978) (same).

Although Johnson opted to plead guilty rather than be tried to a jury, petitioner contends that the availability of

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[19] Present Arkansas law provides that a plea agreement is not binding on the trial judge but the court may permit the agreement to be disclosed to him and may concur therein:

> RULE 25.1 Propriety of Plea Discussions and Plea Agreements.
>
> (a) In cases in which it appears that it would serve the interest of the public in the effective administration of justice, the prosecuting attorney may engage in plea discussions for the purpose of reaching a plea agreement. He shall engage in plea discussions and reach a plea agreement with the defendant only

through defense counsel, except when the defendant has waived or refused his right to be represented by appointed or retained counsel.

(b) Similarly situated defendants shall be afforded equal opportunities for plea discussions and plea agreements.

• • •

RULE 25.3 Responsibilities of the Trial Judge.

(a) The judge shall not participate in plea discussions.

(b) If a plea agreement has been reached which contemplates entry of a plea of guilty or nolo contendere in the expectation that the charge or charges will be reduced, that other charges will be dismissed, or that sentence concessions will be granted, upon request of the parties the trial judge may permit the disclosure to him of the agreement and the reasons therefor in advance of the time for tender of the plea. He may then indicate whether he will concur in the proposed disposition. If, after the judge has indicated his concurrence with a plea agreement and the defendant has entered a plea of guilty or nolo contendere, but before sentencing, the judge decides that the disposition should not include the charge or sentence concessions contemplated by the agreement, he shall so advise the parties and then in open court call upon the defendant to either affirm or withdraw his plea.

(c) If the parties have not sought the concurrence of the trial judge in a plea agreement or if the judge has declined to indicate whether he will concur in the agreement, he shall advise the defendant in open court at the time the agreement is stated that:

(i) the agreement is not binding on the court; and

(ii) if the defendant pleads guilty or nolo conendere the disposition may be different from that contemplated by the agreement.

(d) A verbatim record of all proceedings had in open court pursuant to subsections (b) and (c) of this rule shall be made and preserved by the Court.

Ark. R. Crim. P. 25.1, 25.3 Ark. Stat. Ann. Vol. 4A (Repl. 1977).

that remedy removed any claim of prejudice Johnson might have. [20] As indicated by the Third Circuit in *Scotland*, the prosecutor has no duty to enter into plea bargaining and thus there is no rationale for finding a jury trial is sufficient for a defendant who has not been offered a plea proposal and insufficient for a defendant who has. 614 F.2d at 365. This rationale is consistent with this Court's previous recognition that there is no constitutional right to a plea bargain. *Weatherford v. Bursey*, 429 U.S. 545, 561 (1977). [21] The Third Circuit indicated that to hold that the right to a jury trial was not an adequate remedy under the circumstances would result in belittlement of that fundamental right. *Government of the Virgin Islands v. Scotland*, 614 F.2d 360, 365 (3rd Cir. 1980). In *Corbitt v. New Jersey*, 439 U.S. 212 (1978), this Court considered a New Jersey statutory scheme which authorized assessment of different sentences in murder prosecutions depending on whether the accused was tried to a jury or entered a plea of non vult or nolo contendere. Recognizing the importance of the plea bargaining process, by analogy, the majority opinion acknowledged that a statutory framework for entering a guilty plea may confer more of a benefit of leniency on the accused than on one who stands trial. 439 U.S. at 223-224. That consideration was not fatal to the statutes under consideration, however, because one who stands trial and

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[20] The Eighth Circuit Court of Appeals gave little consideration to whether the right to a jury trial would adequately remove any prejudice Johnson might claim, focusing primarily on its effort to curb prosecutorial abuse even though there was no evidence of such abuse in the record. In addition, the court below found that a jury trial would not provide Johnson with "the benefit of the bargain, that is, jury trial will not protect the defendant's reasonable expectations that the government will honor its proposals." *Johnson v. Mabry*, 707 F.2d 323, 330 (8th Cir. 1983).

[21] In *Weatherford v. Bursey*, 429 U.S. 545 (1977) defendant's argument that the presence of an undercover agent during conferences with defense counsel lost the defendant his right to plea bargain was rejected. "It is a novel argument that constitutional rights are infringed by trying the defendant rather than accepting his plea of guilty." 429 U.S. at 561.

elects to contest his guilt also might be acquitted or convicted of a lesser degree of homicide. 439 U.S. at 225. Moreover, the right to a jury trial also affords the accused the right to force the government to its proof to make its criminal case against him without his aid. *Corbitt v. New Jersey*, 439 U.S. at 233, and note 6, Stevens, J. dissenting.

Johnson, upon withdrawal of the plea offer, remained cloaked with the presumption of innocence and assumed the posture of again forcing the State to try to convince the jury that he was guilty. Petitioner urges, therefore, that the right to a jury trial was an adequate alternative remedy which removed any prejudice Johnson could claim from his consideration of the prosecutor's plea offer. This is especially true since Johnson had not already entered a guilty plea, i.e., openly admitted his participation in the crime and thereby waived all rights attendant an accused in a criminal prosecution. *Boykin v. Alabama*, 395 U.S. 238, 242 (1969) (A plea of guilty is more than a confession, it is a conviction with nothing left but judgment and punishment.); *Brady v. United States*, 397 U.S. 742, 758 (1970) (same). Neither had Johnson otherwise exposed himself to criminal liability in any other case for which he could be prosecuted. Nor had he subjected himself to the risk or threat of physical harm from persons he might have implicated in this or any other criminal investigation. See, e.g., *People v. Heiler*, 79 Mich. App. 714, 262 N.W.2d 890 (1978) (Michigan appellate court found defendant had suffered no prejudice since he had not made any inculpatory statements nor had he been precluded trial preparation time while he considered the State's offer for one day before accepting it prior to its withdrawal); *Shields v. State*, 374 A.2d 816 (Del. 1977) *cert. denied* 434 U.S. 893 (1977). (defendant not entitled to have plea proposal enforced even though accepted but later withdrawn by prosecutor, noting that defendant did not substantiate his claim that government gained valuable information by plea agreement).

Petitioner urges this Court to refuse to follow the reasoning of *Cooper* and the opinion below. In so conten-

ding, petitioner notes that the Fourth Circuit, prior to its decision in *Cooper*, had expressly held that the government would not be permitted to breach its promise to a defendant regarding plea negotiations if that defendant had relied to his prejudice. *United States v. Carter*, 454 F.2d 426 (4th Cir. 1972), aff'd on remand 490 F.2d 1407, *cert. denied* 417 U.S. 933 (1974). In *Carter*, the defendant was promised, by a government prosecutor in the District of Columbia, that if he incriminated himself and others, he would not be prosecuted anywhere else for the commission of crimes he divulged. The case came before the Fourth Circuit upon contemplation of defendant's further prosecution in the Eastern District of Virginia. The Fourth Circuit considered of paramount importance imposition of checks on government attorneys who make bad bargains noting the probability of multistate prosecutions by the federal government. The court noted that in such situations, the solution lay in administrative controls promulgated by the United States Attorney General and that at stake, was "the honor of the government, public confidence in the fair administration of justice and the efficient administration of justice in a federal scheme of government." Id. at 428. In an addendum to the opinion, it was noted that this Court had subsequently decided *Santobello v. New York*, 404 U.S. 257 (1971) and that the holding in *Carter* was consistent therewith. *United States v. Carter*, 454 F.2d 426, 428-429.

The Eighth Circuit Court of Appeals cited *Carter* in *United States v. Minnesota Mining and Manufacturing Co.*, 551 F.2d 1106 (8th Cir. 1977) when it too held that a defendant in a plea agreement who fully discharges his obligations, is entitled to have the government honor the agreement. Unlike the situation in *Carter*, however, the Eighth Circuit did not appear to be addressing alleged bad faith on the part of the prosecuting attorney. Rather, the opinion centered more on the defendant's fulfillment of the agreement and thus, his reliance to his detriment on the government's promise.

As indicated earlier, both the Fourth and Eighth Circuits in the opinion in *Cooper* and that below, have assumed their particular positions in an effort to curb potential prosecutorial abuse in the plea bargaining process. Such alleged abuse, vindictiveness, bad faith, unscrupulous conduct or harrassment on the part of the government, however, neither appears in the respective records nor was even alleged by Cooper or Johnson. This Court recently declined to adopt an inflexible presumption of prosecutorial vindictiveness in a pretrial setting. *United States v. Goodwin*, 457 U.S. 368 (1982). Thus, petitioner submits that the rule announced premised upon the observation that government agents may abuse the plea bargaining process is inappropriate to the facts and should not be permitted to stand. This is especially true in light of this Court's holding in *Bordenkircher v. Hayes*, 434 U.S. 357 (1978) and its frank acceptance of the principle as constitutionally legitimate that the prosecutor's interest in plea bargaining is to persuade the defendant to forego his right to plead not guilty. Id. at 364.

If this Court's recognition of the concept of mutuality of advantage in the plea bargaining process is to have meaning [Id. at 363], and petitioner believes it does, then the concept of fundamental fairness expressed in *Santobello* must apply not only to the defendant but to the government as well. Necessarily, fundamental fairness implies flexibility in its application to plea negotiations and thus should not be so restricted or narrowly defined that, in essence, the courts become seated at the bargaining table or assume the posture of scrutinizing bare plea proposals absent allegations that a defendant has been mistreated by egregious conduct on the part of a prosecutor.

Holding a prosecutor to a bad bargain caused by an inadvertent mistake on his part, the basis of which is a misstatement, or any number of innocent reasons, does not benefit either the defendant who is willing to admit his criminal conduct and accept just punishment for his crime

against society or the prosecutor who has an interest in protecting the populace from criminal conduct by seeing that our criminal laws are enforced at a minimum of expense and inconvenience to the citizens of the state. Accordingly, petitioner contends the court below was remiss in holding that Johnson was entitled to specific performance of the prosecutor's plea offer, based on an admitted mistake, absent Johnson's entry of a plea of guilty or other reliance to his detriment on the proposal.

CONCLUSION

For the foregoing reasons, supported by citations to legal authority, petitioner prays that the judgment of the Eighth Circuit Court of Appeals be vacated. It is further prayed that the judgment entered by the district court denying respondent habeas corpus relief be reinstated in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Alice Ann Burns, Deputy Attorney General, do hereby certify that a copy of the foregoing Brief has been served upon the respondent herein by placing a copy of same in the U.S. Mail, postage paid, addressed to Richard Quiggle, Attorney at Law, 904 West Second St., P.O. Box 2651, Little Rock, Arkansas, this 15 day of February, 1984.

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No. 83-328

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

JAMES MABRY, COMMISSIONER
ARKANSAS DEPARTMENT OF CORRECTIONS
Petitioner,

v.

GEORGE JOHNSON
Respondent

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENT'S BRIEF

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RESPONDENT'S BRIEF

SUMMARY OF THE ARGUMENT

The issue is whether a criminal defendant, who has accepted a valid plea proposal, may obtain some form of enforcement of the agreement if the prosecution refuses to perform according to the terms, continues bargaining and eventually obtains a guilty plea to an enhanced sentence. Although contract principles offer poor guidance in this area, there was an offer, acceptance and consideration. The suggestion that there must be detrimental reliance is a mere tautology. The bargain should be enforced as a matter of fundamental fairness. The use of contracts to analyze principles of human rights has historically proven unsuccessful. Despite this, if classic contract principles are utilized, a binding agreement was reached.

There was an offer which was accepted. The promises provided the consideration. The concept of detrimental reliance has no bearing on this case since the prosecutor made it impossible for respondent to perform. Thus, the argument that respondent should have to had detrimentally relied is a tautology, and one which ignores the fact he did plead guilty to an enhanced sentence.

However the principle reason why this agreement should be enforced is that it would be fundamentally fair to do so. This is consistent with other rights enjoyed by an accused, rights which have nothing to do with contracts. Surely an accused should enjoy as much protection of his rights while giving them up as he does at all other stages of the criminal justice system. Moreover, this Court has recognized the importance of plea bargaining to the criminal process. Clearly the system would come to a halt if no pleas bargains were made. While the prosecution may not be required to make offers in any given case, once an offer is made a prosecutor's word should be good, if for no other reason than to assure continued participation in the process by criminal defendants. Afterall, even convicted persons must be treated fairly at the hands of the state.

The supposed "prophylactic rule" is based on a misunderstanding of the opinion below. The court below held that under the facts of this case respondent was entitled to relief. The State offered no proof that the prosecutor reneged on his agreement for acceptable reasons.

The right to effective counsel is also important to the outcome of this case. Defendants ordinarily negotiate only through counsel. If the State is allowed to intrude into the attorney-client relationship, it can destroy that relationship, and it would make the right a sham.

The remedy here is certainly appropriate since respondent did in fact plead guilty, and has served his term of confinement under the enhanced sentence.

The grave uncertainties and interference perceived by the State are illusory. The suggestion that all plea proposals should be in writing would be unworkable. More importantly, one attorney should be able to take the word of another. Also, the opinion below would not interfere with either judicial or prosecutorial discretion. A judge is always free to reject a plea proposal but should state why the proposal is unacceptable. A prosecutor can back out of an otherwise valid agreement provided there is proof his actions are justified. Such proof was not offered here.

Finally, since respondent has served the enhanced sentence and is free on parole, review was improvidently granted, or the case is moot.

ARGUMENT

1. INTRODUCTION

The State[1] advances to this Court a proposition at once as bold as it is self-contradictory:

> A criminal defendant, who accepts an unambiguous offer to plead guilty in exchange for the government's promise to act in a certain way, cannot enforce that agreement unless he has somehow detrimentally relied upon it.

This proposition is bold because it entirely ignores that a criminal defendant should be treated fairly, both procedurally and substantively, by the government. It is self-contradictory because by the very framing of the

[1] This term is used to refer to both the petitioner and the amicus, the Solicitor General of the United States.

proposition only one result is possible: enforcement cannot be obtained.

Given those shortcomings this Court should reject the State's proposition and affirm the Eighth Circuit's opinion below.[2]

2. ANALYSIS UNDER CONTRACT PRINCIPLES

Under the facts of this case, contracts concepts have no place. Most significantly, the law of contracts is ill-suited to Consitutional analysis, and should only be resorted to in the most sparing and exacting of circumstances. Second, even if the law of contracts is to be applied to this case, a valid and enforceable contract existed. Finally, the State's use of the concept of detrimental reliance is based on a false tautology.

(A). Contracts And The Constitution

Without exhaustive analysis it is clear that contract law has evolved to solve the unique problems associated with civil agreements involving commerce. As in the related field of property law, the goal of contract law is to promote certainty and predictability. Many mechanical rules have grown up over the centuries, especially those involved with property contracts, which are not valid at all in the area of human rights.[3]

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[2] Johnson v. Mabry, 707 F.2d 323 (8th Cir. 1983).

[3] A central tenet of property contracts was that one could sell, or not, to whom one chose. Modern thinking is precisely to the contrary, Shelly v. Kramer, 334 U.S. 1 (1948) (restrictive covenants excluding blacks cannot stand when the force of the state is put behind them); Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) (state may not allow discrimination based on race through a lease to a private party); Reitman v. Mulkey, 387 U.S. 369 (1967) (state may

One reason to adopt or analogize from one body of law to another is where there is a common heritage. A salient example is Title VII's (42 U.S.C. § 2000e, *et. seq*) predicate in the National Labor Relations Act, 29 U.S.C. § 151, *et seq*. Similarly, Title VII also shares common proof concerns with other non-discrimination laws, *Castaneda* v. *Partida*, 430 U.S. 482 (1977) (statistics in voting rights) and *Hazelwood* v. *U.S.*, 433 U.S. 299 (1977) (statistics in employment discrimination); *Lee* v. *Russell Cty. Bd. of Edc.*, 689 F.2d 769 (5th Cir. 1982) (school desegregation and employment rights). *No* such similarities exist, however, between the field of contracts and Constitutional law. Analogies between the two are historically limited, and after the *Lochner* era, totally discredited.[4]

Moreover, the law of contracts has historically proven to be an awful guide where the principles of human dignity and fairness under the law are concerned.

For example, contracts were the backbone of the entire slavery system, *see*, e.g., Hurd, *The Law of Freedom and Bondage*, Vols. 1 and 2 (Little & Brown, 1862). Also, in the Jim Crow era that followed the Civil War, many states manipulated the right of blacks to contract for the same services as whites, limiting them instead to separate but equal opportunities. *Plessy* v. *Ferguson*, 163 U.S. 537 (1896). The sanctity of contracts also allowed for

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not, in light of 42 U.S.C. § 1982, allow even private persons to sell to whom they choose); Jones v. Alfred H. Meyer Co., 392 U.S. 409 (1968) (purely private sales agreements, when racially motivated, also violate § 1982), and Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969) (assignments may not be defeated on racial grounds in private park).

[4] Lochner v. New York, 198 U.S. 45 (1905).

inhuman working conditions for bakers, *Lochner* v. *New York*, 198 U.S. 45 (1908); and discrimination against workers who wished to organize, *Coopage* v. *Kansas*, 236 U.S. 1 (1915); *Adair* v. *U.S.*, 208 U.S. 161 (1908).

Given that contract principles, particularly when coupled with "state action," have proven so oppressive to fundamental human rights, this Court should be chary indeed—as was the Eighth Circuit below—to erect an absolute contract rule of detrimental reliance for all criminal defendants as urged by the State.

(B) A Valid Contract Existed

Although contract principles should not necessarily control the outcome in this case, contrary to the assertions made by the State, a valid contract did exist here. Thus, the State's claim that no contract existed which could be enforced is incorrect.

The basic elements of all contracts are offer, acceptance and consideration. When each element is present a valid contract comes into existence.

Here the prosecutor made a classic offer: he promised to recommend a sentence of 21 years to be served concurrently with the 21 year sentence Mr. Johnson was serving, if Mr. Johnson would promise to plead guilty to the charges against him. This offer was communicated to Mr. Johnson, and he accepted it. Mr. Johnson's acceptance was communicated to the prosecutor, who then refused to perform the original offer.[5] Subsequently, Mr.

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[5] Such promises are good consideration in the law of contracts, U.S. v. Lieber, 473 F. Supp. 884, 892 (S.D.N.Y. 1979).

Johnson did plead guilty to the charges against him, but he was sentenced to a term of 42 years.[6]

Mysteriously, the State argues that Mr. Johnson should not be allowed to enforce the original contract because he did not detrimentally rely on it. This argument totally ignores the fact that Mr. Johnson did plead guilty and an additional sentence of 21 years was imposed on him. It also ignores the fact that Mr. Johnson served the entire sentence required of him. If this performance is not detrimental reliance, it is difficult to imagine what would be.

It is obvious that the only reason Mr. Johnson did not perform according to the terms of the original contract is because the prosecutor made that performance impossible by improperly withdrawing the offer.

It is inconceivable in the commercial setting that a contract *and* detrimental reliance would not be found where the injured party had performed twice as much as the original agreement contemplated.

(C) The State's Tautology

The State's suggestion that the concept of detrimental reliance be injected into the plea bargaining process is inequitable, factually incorrect and tautological.

The concept of detrimental reliance is an equitable principle that was engrafted into the law of contracts. The essence of the concept is that courts will not allow a party to avoid the terms of a failed agreement where the other party has changed their position or been prejudiced because he believed there to be an agreement.

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[6] That the original offer was accepted before it was supposedly withdrawn, is uncontroverted under the facts of this case. *See* the hearing transcript at 63.

Detrimental reliance may be active or passive: a party may expend resources or undertake commitments; or may fail to act because the other party promised to do something. In the area of "criminal law plea bargaining," passive detrimental reliance, is impossible. Particularly under the facts of this case, there is no way Mr. Johnson could have relied in a passive fashion to his detriment. Moreover, the State in no way explains how Mr. Johnson could have detrimentally relied in an active sense. In this context, active detrimental reliance is equallly a *non sequitur:* what possible affirmative steps could Mr. Johnson, or any criminal defendant, take to legally alter his position under facts like these?[7]

Thus, because an accepting defendant cannot detrimentally rely on a prosecutor's reneged offer, merely phrasing the question in these terms produces only one possible result: no enforcement.[8]

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[7] What the State is actually suggesting is that the government would never be bound by its word until after the criminal defendant had actually uttered the word "guilty" to the trial court, or had otherwise been harmed. In other words, the argument is, the government may continue to negotiate—breaking its promises in the process—without giving the defendant any recourse, until this form of repression literally made *any* other remedy impossible. To enshrine such a capacity for abuse in the law of the land would be a tragedy. Moreover, it would be only a short step away from saying: it is perfectly acceptable to extract confessions by torture *as long as you don't do permanent injury;* illegal searches are permissible, *as long as they do not turn up harmful evidence.* Formalizing a rule that would allow for ready oppression by the prosecution surely would "drive the practice of plea bargaining back into the shadows from which it has so recently emerged." Blackledge v. Allison, 431 U.S. 63, 76 (1977).

[8] The tautology in its more extended form runs as follows: A defendant who accepts a prosecutor's offer to plead guilty must detrimentally rely on the bargain in order to enforce it; detrimental

3. DUE PROCESS CONSIDERATIONS

(A) No Reliance, No Due Process Violation?

At the heart of the State's attack on the Eighth Circuit's opinion is the idea: if there was no reliance (that is, material change in position or prejudice), then there can be no due process violation.

Even if facially beguiling, this reasoning must be rejected for at least three reasons.

1. Criminal defendants should, as the Eighth and Fourth Circuits have recognized, have a right to have their bargains with the prosecution enforced as a matter of fundamental fairness. Although not explicated in either opinion, such a right is consistent with the due process rights that have long been afforded those accused of a crime. Thus, an accused has a right to be told what his rights are, *Miranda* v. *Arizona*, 384 U.S. 486 (1966); to be represented by counsel; *Gideon* v. *Wainwright*, 372 U.S. 335 (1963)[9]; to be free from illegal searches and seizures, *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971); to not have a confession coerced, *Brown* v. *Mississippi*, 297 U.S. 278 (1936); or to have such a confession suppressed, *Jackson* v. *Denno*, 378 U.S. 368 (1965); to a copy of the trial transcript, *Griffin* v. *Illinois*, 351 U.S. 12 (1955); and assistance of counsel on appeal, *Douglas* v. *California*, 372 U.S. 353 (1963). Moreover, an accused—presumed innocent—is to suffer no diminution of rights or punishment, *Bell* v. *Wolfish*, 441 U.S. 520 (1979).

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reliance is impossible for the accepting defendant; therefore, the bargain may not be enforced. The Aristotelian logic of the argument is flawless, but it ignores totally practical reality.

[9] Competent Counsel too, *see*, e.g., McQueen v. Swenson, 498 F.2d 207 (8th Cir. 1974).

The State suggests that none of these protections has any bearing on the right of an accused to give up the central right which is the key upon which the others are predicated: the right to be presumed innocent. All of those due process protections are surrendered upon entry of the guilty plea. But the crucial consideration for present purposes is not the surrender of those rights but the fact that they exist, based not on contract, but upon the principle of fundamental fairness. And, inherent in this complex of rights is the principle that the state must treat the criminally accused with fairness, *regardless* of the accused's conduct before or after the possibility of guilt centers upon him.[10]

Contrary to the State's suggestion, logically an accused has at least as many rights or protections in the decision to give up his rights, as he does in seeking to enforce them.

Foremost among those rights—as recognized by the Eighth and Fourth Circuits—should be the right to be treated fairly during the decision to relinquish those rights. A different decision would be anomolous, for it would place the Court in the position of saying that an accused has due process rights as he proceeds through the criminal justice system—rights for which he does not bargain and gives nothing—yet has no rights at all when he bargains to give up some or all of those other rights.

2. As this Court has recognized, plea bargaining is an essential component of our judicial system, *Santobello* v. *N.Y.*, 404 U.S. 257 (1971). If either party to the process uniformly refused to proceed with negotiations, the court

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[10] Interestingly, the honesty and integrity of the government in its dealings with criminal defendants is not discussed in Government of Virgin Islands v. Scotland, 614 F.2d 360 (3rd Cir. 1980).

system would be crippled. While not suggesting that the state must enter into bargaining discussions in any particular case, *Weatherford* v. *Bursey*, 429 U.S. 545 (1977), it is manifest that the state *must* negotiate pleas in most cases.[11] Without pleas in most cases, or a gigantic increase in the public outlay for prosecutions (both for increased court and prosecution staffs), the public is ill-served.

While it is a remote possibility indeed that all negotiations in criminal matters would breakdown or expire, the central nature of such negotiations is readily apparent. Not only must such negotiations continue for the public good,[12] once negotiations are undertaken, they must be attended with scrupulous good faith. Such good faith not only serves the public's interest in our system of justice, but insures the continued participation of defendants in the process.

3. The State's suggestion that defendants should have no right in the plea bargaining process finds no support in the criminal justice system generally. As already outlined, it is clear that unconvicted defendants do, consistent with their presumed innocence, enjoy many parallel and unnegotiated rights. Also, defendants who elect trial are accorded a wide panoply of rights, given their presumed innocence: trial by jury, *Duncan* v. *Louisiana*, 391 U.S. 145 (1969); trial by an impartial jury, *Groppi* v. *Wisconsin*, 400 U.S. 505 (1971); to a speedy

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[11] Petitioner's brief at 25 n. 16 amply demonstrates the crucial role of plea bargaining. Virtually all of the criminal cases in the country are resolved by negotiations. This is consistent with the figures cited by this Court in Santobello.

[12] Which is served not only by holding down costs, but by the least corrosive, and hopefully most salutory, of processes—an acknowledgement of wrongdoing in exchange for a fair disposition under the circumstances. *See*, Santobello at 260.

trial, *Klopfer* v. *North Carolina*, 386 U.S. 213 (1967); a jury of his peers, *Strauder* v. *West Virginia*, 100 U.S. 303 (1880); to have a jury uninfluenced by publicity, *Shepard* v. *Maxwell*, 384 U.S. 333 (1966); and to confront and cross examine the witness against him, *Pointer* v. *Texas*, 380 U.S. 400 (1965).

Additionally, it is now abundantly clear that under our system of justice, even those convicted of major crimes against society do not lose all of their constitutional rights, *Jones* v. *North Carolina Prisoners' Labor Union*, 433 U.S. 119 (1977), particularly rights of due process, *Morrisey* v. *Brewer*, 408 U.S. 471 (1972) (rights to due process hearing in disciplinary proceedings); *Wolff* v. *McDonald*, 418 U.S. 539 (1974) (rights to due process in connection with "good time credits").

(B). No Rights To Plea Bargain.

Next, it is suggested by the State that simply because an accused has no right to plea bargain, he has no right to enforce such agreements if reached.

Mr. Johnson has never suggested he had a right to force the prosecutor to make him an offer. Rather, and as the Eighth Circuit found, once the prosecutor decided to do so, the prosecutor had to be both accurate and scrupulous in making one.

Although the State suggests it should be held to no burden at all in the plea bargaining process, the settled law suggests the absolute contrary is true.

For one thing, the state must extend many rights to defendants which are not negotiable at all. In those areas in which negotiations, or a waiver of rights, might occur, the state is strictly limited in the way it must conduct itself, *Brewer* v. *Williams*, 430 U.S. 387 (1977).

Moreover, in light of the fact that the state must accord a defendant many rights with no bargaining at all, it is disingenuous in the extreme to suggest that when the state does decide to bargain with an accused—presumably, in the best interests of both—that it owes defendant nothing, *even where, as in this case, there is a consummated agreement made in good faith.*[13]

Particularly in instances like respondent's, the lower courts have found enforceable bargains, even when the prosecution was incapable of performance, *Palermo* v. *Warden*, 545 F.2d 286 (2nd Cir. 1976); *U.S.* v. *Lieber*, 473 F. Supp. 884 (S.D.N.Y. 1979).

Courts daily hear and determine evidence on such claims, and make rulings which seem warranted under the proven facts. Nothing greater is suggested here. If the prosecutor elects to enter plea negotiations, and some understanding is reached which the prosecutor then renounces, the bargaining defendant is entitled to a hearing on the terms of the purported agreement.[14]

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[13] Good faith is required in all commercial contracts for sales. It is hard to image that "deals" in the criminal law setting are deserving of a lower standard of conduct. *See*, UCC provision 1-203 as embodied in Ark. Stat. Ann. 85-1-203.

[14] The State, however, says not even this right exists. However, nothing seems more fundamental to our system of justice than the opportunity to be heard on a disputed question of fact: was an agreement reached or not? If yes, then the accused is entitled to the opportunity to enter his/her guilty plea (surrendering a host of fundamental rights). If not, the state is entitled to continue with bargaining or to seek a jury trial in the vindication of the public interests in justice.

Such due process rights are consistently applied whenever adverse government actions are involved, *Goldberg* v. *Kelly*, 397 U.S. 179 (1970).[15]

4. THE SUPPOSED PROPHYLACTIC RULE

The State also argues that the Eighth Circuit's so-called prophylactic rule is unnecessary to the integrity of the plea bargaining process. This is so, the argument runs, because the defendant is "not without recourse" and because of some unspecified (if not imaginary) "inherent safeguards of the plea bargaining process." Amicus at 18 and at n.20. Particularly under the facts of this case, this argument is nonsense. Moreover, it is predicated on a misunderstanding of what the Eighth Circuit actually said.

As advanced, the State claims that the Eighth Circuit announced a prophylactic rule because it:

> *[P]erceived a possibility* that the government could "take advantage of [the defendant's] acceptance of the plea proposal," perhaps by "exploit[ing] [his] decision to plead guilty by further hard bargaining and by recommending a long sentence."

Amicus at 18.

This manipulated quotation clearly misconstrues the holding below and the facts of this case because the Eighth Circuit was concerned not with the *possibility* of exploitation by the prosecutor, but with the fact that such exploitation had already taken place.

Indeed, the facts show that an offer to plead guilty to 21-year concurrent terms was communicated to respon-

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[15] The Scotland court explicitly understands that there is a distinction between the court's recognition of a valid plea and its acceptance of that plea. Scotland at 364.

dent's counsel. He in turn communicated the offer to respondent, who accepted. This acceptance was conveyed to the prosecutor, who afterwards announced that a mistake had been made and that, notwithstanding Mr. Johnson's acceptance, the offer was withdrawn. A second offer for a 21-year consecutive term was then made. After some months of delay, this offer of a doubled term of confinement was eventually accepted by respondent.[16]

Thus, because the prosecutor had *in fact* taken advantage of respondent's willingness to plead guilty, had *in fact* continued bargaining and had *in fact* eventually driven home a tougher bargain, the Eighth Circuit stated:[17]

> We will not allow the government to take advantage of petitioner's acceptance of the plea proposal, in the absence of any change in the underlying circumstances, and to exploit petitioner's decision to plead guilty by further hard bargaining and by recommending a longer sentence.

Joint Appendix at 37.

The suggestion, therefore, that this is supposedly a "prophylactic rule" does not square with the facts or the opinion below.

Also tangled up with this mistaken view of the facts and the Eighth Circuit's opinion, is the State's suggestion

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[16] Amicus at n. 18 appears to suggest that both defense counsel and the prosecutor may freely lie to one another in the bargaining process as a matter of mere "tactics." The only other possible reading of this footnote is that attorneys on both sides may make promises they do not intend to keep in an effort to see how earnestly the opposition seeks to avoid trial. Either position is unacceptable.

[17] This quotation is the source of the State's partial quotation extracted above.

that unless the prosecutor's conduct is actually shown to be improper, the bargain as struck should not be enforced. It is clear, however, that such a showing of actual impropriety on the part of the prosecutor would be virtually impossible. Accordingly, the court below, and the Fourth Circuit in *Cooper* v. *U.S.*, 594 F.2d 12 (4th Cir. 1979), placed the burden of showing legitimate grounds for the withdrawal of the bargain on the prosecution. No such showing was made here.

In the absence of some proof that the prosecutor's mistake truly justified a withdrawal of the bargain, the Eighth Circuit was obviously unwilling to assume the same. This Court should be likewise reluctant to assume such, and in similar contexts has held that unexplained harshness to criminal defendants is impermissible, *North Carolina* v. *Pierce*, 395 U.S. 711 (1969); *Blackledge* v. *Perry*, 417 U.S. 21 (1974).

5. SIXTH AMENDMENT CONSIDERATIONS

Following the rationale in *Scotland*, *supra*, it is argued that breached plea bargains do not implicate the Sixth Amendment right to effective counsel. For reasons both peculiar to this case, and generally, this argument should not be adopted.

Unlike *Scotland*, no attempt was made here by respondent's trial attorney to enforce his bargain with the prosecution. Inasmuch as the attorney who handled this case from the day of the broken bargain until respondent entered his ultimate plea to the doubled sentence was found to have been ineffective in his representation, this failure is not surprising.

But even apart from the facts of this case, to ignore the Sixth Amendment aspects of the bargaining process would be incorrect. Only in the most rare of instances will

a criminal defendant bargain directly with the government, given that any defendant too poor to afford counsel must have one appointed. Particularly in those instances, where as here, appointed counsel *appears* as an arm of the government,[18] it is essential to the foundations of this system that a defendant can rely on his counsel. If the government is allowed in any way to undercut this relationship, it all too easily will lead to further suspicions that such counsel represents the government and not the client, and may by lack of confidence impair counsel's ability to adequately prepare due to client mistrust. In other words, the attorney-client relationship—especially in the criminal setting—must be founded in complete trust. If the client's trust of his counsel is dashed by the government, it may well cause him to hold back crucial facts to his defense.[19] The mere possibility of this occurrence interjects into the relationship a factor which has the potential to destroy the very basis for *Gideon, supra*, which is that attorneys are absolutely essential to the criminal justice system. Indeed, *Gideon* assumes—and a legion of Circuit court cases make clear—mere appointment is not enough: the attorney appointed must be effective, which obviously means he must be allowed to be so.[20] Any impediment to this relationship imposed by the

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[18] Appearances in this context do count, even if strictly speaking such appearances do not amount to actual state action, Polk County v. Dodson, 102 S.Ct. 445 (1981).

[19] Any withheld facts are equally important in bargaining as well as trial.

[20] It is difficult enough in any criminal setting to obtain the complete confidence and revelation of a defendant. If the government is allowed to intrude into that relationship in any way, there is almost no likelihood that the necessary prerequisities will ever be accomplished.

government is intolerable. In short, a ruling which would allow the government to make defense counsel appear ineffective is tantamount to a holding that *Gideon* and its progeny are a sham: appointment is sufficient, even if the government may be able to make that appointment appear less than vigorous, or even worse, tainted.

6. THE REMEDY

In arguing that the remedy here (specific performance) is inappropriate, the State makes several serious admissions. These admissions, rather than indicating reversal, as urged, indicate the contrary.

First, it is noted that specific performance is "often the least disruptive remedy," Amicus at 24. Respondent agrees.

Second, "[s]pecific performance is often a more convenient remedy because it does not entail holding a trial," Amicus at 24. Again, respondent agrees.

Third, "[s]pecific performance may be considered more appropriate once a significant portion of the sentence has been served." Amicus at 24. (Citations omitted). Respondent certainly agrees since *all* of his sentence under the terms of the *enhanced agreement* was served and he is now free on parole.

Fourth, it is argued that the passage of time often makes successful retrial "less likely." Amicus at 24, (Citations omitted). Again respondent agrees, precisely because of the facts of this case. Not only has it been 14 years since respondent's original trial, but Mr. Siscoe, the

main witness against respondent at his original trial, is dead.[21]

Finally respondent would certainly agree that specific performance is the appropriate remedy where, as here, "the government has already received what it bargained for, and it would not be possible to 'wipe the slate clean' by merely vacating the plea." Amicus at 24-5.

7. GRAVE UNCERTAINTY AND INTERFERENCE?

(A). Grave Uncertainty.

The State perceives that to uphold the decisions below would induce grave uncertainties into the plea bargaining process. The essence of this fear stems from the fact that plea agreements like those of respondent's are not in writing and are not placed upon the record. This apprehension is misplaced.

First, there are no facts in the record of this matter which would cause any uncertainty that a bargain was offered, accepted and then repudiated.[22] Unquestionably, it is possible to conceive of instances where a dispute between the prosecutor and the defense over what was offered and accepted may occur. However, that is not this

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[21] On the other hand, from respondent's viewpoint, his defense is prejudiced because a key witness, Eddie Jackson, is unavailable. The failure of original defense counsel to interview or insure Jackson's availability at trial caused the district court to find that respondent's counsel was ineffective. The Eighth Circuit did not reach the question of whether this fundamental flaw in the advocacy process violated respondent's rights, requiring a shift in the burden of proof, because it upheld respondent's rights to enforce the original bargain.

[22] Because there is no factual dispute in this case over the bargain and its terms, it presents a different question than that raised in Blackledge v. Allison, 431 U.S. 63 (1977).

case. Nor should this mere possibility control the outcome. The existence and terms of alleged agreements can be resolved easily enough by trial courts.

Second, the State's position assumes that all plea negotiations are conducted in writing, or that the same are null if they are not. Most—if not virtually all—plea negotiations are conducted orally by counsel, just as settlement negotiations are conducted by counsel in civil matters. To suggest that all plea negotiations be conducted in writing would be to impose a serious impediment to the actual functioning of the criminal justice system. Moreover, it would impose by formal rule a sanction against one lawyer taking the word of another—the very basis upon which most bargains are concluded.

(B). Judicial Discretion

Although it is argued that judicial discretion would be interefered with if this decision is upheld, that is not the case. Rather, under normal circumstances, judicial discretion would be unimpaired by a ruling from this Court that defendant does have due process rights to make a prosecutor live up to his bargains.[23]

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[23] To the degree the State suggests that the better procedure would be for defendants to bring broken bargains to the attention of the trial court, as was done in Scotland, respondent agrees. That was not done by trial counsel here unfortunately. To penalize respondent because his appointed trial counsel was not sagacious or creative enough to apply Santobello to his factual situation, however, seems unduly harsh. Given that a flaw occurred in the advocacy on respondent's behalf a decade and a half ago, it was not improper for the Eighth Circuit to order direct relief. Even the amicus admits that federal courts do have sufficient supervisory authority in cases of proven constitutional violations to order such relief. Amicus at 26. Of course, the relief ordered is only rational if this Court also finds

Whether the trial court is compelled to adopt the strict terms of such a bargain is a different question. Respondent has not—nor does not—suggest that a judicial finding that a bargain had been struck is necessarily binding on the court which may put that agreement into effect.

(C). Prosecutorial Discretion.

The decision below does not tamper with prosecutorial discretion. Indeed, such discretion is left unimpaired insofar as its exercise in non-abusive ways is concerned. A prosecutor may, for example, withdraw offers where the defendant has not disclosed important information or where the prosecution had discovered new evidence.[24]

The decision below does not allow a prosecutor, however, to plead mistake without coming forward with some evidence that this supposed mistake was in fact innocent and justified. Such proof, however, was *never offered* by the State at the hearing in this matter.

(D). The Withdrawal Of "Innocent" Misstatements.

Finally, it is argued that the State should be allowed to correct its "innocent misstatements" (Amicus at 29) about the actual offer made. Aside from the fact that no proof

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respondent had a due process right to enforce his bargain. If not, obviously the relief ordered for him must automatically fail. But the argument against relief should not be allowed to do double duty: that is, the fact that relief was ordered somehow demonstrates no constitutional rights were involved.

[24] Under the facts of this case, the prosecution would be unable to prove either. Afterall, this case had been fully tried on the merits once, and the bargaining that took place obviously benefited from this history. The State put on no evidence concerning how the terms of the offer were withdrawn.

was offered here that the alleged misstatement was "innocent,"[25] this Court should be cautious about accepting mere claims of innocence without some proof. Prosecutorial abuse does exist.

Equally important is the requirement that a prosecutor make plea offers with exactitude. Even the court in *Scotland* found such a proposal unremarkable. *Id* at 264. And indeed it is. No defense attorney worth his salt would ever propose a bargain to which his client had not assented. The prosecution should be held to the same standard.

Accuracy in bargaining among attorneys is not the maximum to be expected, it is the minimum. Any deviation should be condemned, and certainly not approved by this Court. Mere sloppiness by the prosecution in its presentations of bargains should not be ratified by this Court on any grounds—constitutional or otherwise. Such conduct is beneath the standards expected by any member of the bar of any state or federal court.

8. MOOTNESS ISSUE

As indicated above, respondent pleaded guilty to the more onerous sentence proposed by the state after he had agreed to a lesser sentence suggestion.

Respondent has now served the entirety of the more harsh sentence, and is now free on parole.

Given these facts, it is doubtful that the grant of certiorari in this case is provident, or is at least moot.

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[25] The testimony was that the offer was made, accepted and communicated. Only then did the prosecutor insist that any plea be for 21-years *consecutive*, as opposed to *concurrent*.

A fundamental prerequisite of federal court jurisdiction is that an action present an actual "case or controversy" for judicial review. *O'Shea* v. *Littleton*, 414 U.S. 499 (1974). *See*, United States Constitution, Article II, § 2. Thus, federal courts lack authority to entertain cases which have lost their justiciable character as a case or controversy because the "issues presented no longer 'live'." *Powell* v. *McCormick*, 395 U.S. 486, 496 (1969). A formerly justiciable controversy can be mooted by subsequent developments. Indeed, this Court has made clear that a case must remain vital at all stages, not merely at its inception. *DeFunis* v. *Odegaard*, 416 U.S. 312 (1974); *Steffel* v. *Thompson*, 415 U.S. 452 (1974).

In facts like those presented here, the Court has either improvidently granted certiorari, or has done so when the case is moot. Accordingly, this case should be dismissed.

CONCLUSION

If the Court reaches the merits of this case, it should affirm the opinion of the Eighth Circuit.

Respectfully submitted,

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In the

Supreme Court of the United States

October Term, 1983

No. 83-328

James Mabry, Commissioner, Arkansas Department of Correction ..... *Petitioner*

V.

George Johnson ..... *Respondent*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

1. Petitioner believes a response is warranted to Johnson's argument that the government had exploited a harsher sentence by taking advantage of Johnson's willingness to plead guilty. Respondent's Brief at 14-16. A brief restatement of the facts indicates that, after the initial plea offer was withdrawn October 30, 1972, trial was scheduled for November 8 and a mistrial was declared November 9, 1972. Trial was rescheduled for December 7, 1972 and then continued to February 26, 1973. On that date, Johnson appeared before the trial court and plead guilty to the charge of accessory after a felony murder. A 21 year consecutive sentence was imposed. (App. 10-11)

The transcript of the plea hearing was made part of the record at the hearing on Johnson's habeas corpus petition. (T. 3, Aug. 22, 1979 hearing). At that hearing, Johnson was represented by two defense counsel, Harold Hall and John Achor, both public defenders. Achor advised the trial court that Johnson desired to withdraw his plea of not guilty and enter a plea of guilty to accessory after the fact of first degree murder. (Plea hearing, T. 3) The trial court stated that it understood that Johnson wanted to plead guilty and take 21 years with the sentence to commence at the expiration of the sentence imposed in the burglary count, to which defense counsel Achor agreed. (Plea hearing, 4)

Upon being addressed by the trial court, Johnson stated he was pleading guilty of his own free will and accord. (Plea hearing, 6) Johnson also advised the state prosecuting attorney he was pleading guilty because he was guilty. (Plea hearing, 7) The trial court then imposed a sentence of 21 years to commence at the expiration of the sentence Johnson was then serving. (Plea hearing, 8-9)

In *United States v. Holman*, No. 83-1189 (6th Cir., Mar. 9, 1984) the district court accepted Holman's guilty plea and agreement, but then subsequently rejected the agreement based upon information contained in the presentence report. Holman then plead guilty pursuant to a new plea agreement. The Sixth Circuit Court of Appeals noted that Holman, at the time of his subsequent plea, was aware that his objections to the district court's rejection of the first plea agreement had been heard and dismissed. Holman was further aware that a more lengthy custody sentence could be imposed. In rejecting Holman's request for specific performance of the first plea agreement, the Sixth Circuit determined that Holman's entering into the new agreement fully aware of the possible consequences cured any claim of prejudice from the first proceeding. In so holding, the Sixth Circuit cited *United States v. Mack*, 655 F.2d 843, 848 (8th Cir. 1981). There, under a somewhat factually analogous situation, Mack plead guilty a second time after

the district court had rejected his original plea. It was noted in *Mack* that his objections to the earlier district court ruling had been "fully aired" and rejected, that Mack fully understood the original plea agreement was no longer in effect, and that a harsher sentence could be imposed. 655 F.2d at 848. In rejecting Mack's claim for specific performance of the original plea agreement, the Eighth Circuit Court of Appeals held that the second guilty plea hearing removed any taint of prejudice from the earlier proceeding.

Johnson similarly has suffered no prejudice. Defense counsel and Johnson were both aware the State's offer of 21 years concurrent had been withdrawn. (T. 63, 92, Aug. 22, 1979 hearing) Thereafter, Johnson's case was set for trial three times, one of which resulted in a mistrial. Johnson ultimately entered a plea of guilty. Johnson testified at the habeas hearing that he understood from defense counsel he would "come out better" if he "took" 21 years but that he did not understand that sentence would be consecutively imposed. (T. 96, 99, 103, 104, 106, Aug. 22, 1979 hearing) The district court determined that Johnson's argument that his guilty plea was coerced must be rejected in light of Johnson's alternate but inconsistent argument that he believed he was receiving a 21 year concurrent sentence. (App. 12-14) Moreover, the guilty plea hearing indicates Johnson was completely advised that the 21 year sentence would commence at the expiration of the previously imposed sentence. Thus, the three subsequent trial settings and the second plea hearing removed any taint of prejudice Johnson now claims occurred from the State's withdrawal of the initial plea offer.

2. Respondent states he plead guilty (to a 21 year consecutive sentence) and that he is now free on parole. Respondent contends the case now before this Court may be moot. Respondent's brief at 22. Such contention prompts a brief reply from petitioner.

This Court has held that a state prisoner who has been paroled into the custody of the State Parole Board and is subject to the "custody" of its members may still maintain a habeas corpus action pursuant to 28 U.S.C. § 2254. *Jones v. Cunningham*, 371 U.S. 236 (1963). Moreover, the "collateral consequences" of respondent's conviction cause him to have a "substantial stake in the judgment of conviction" that the cause has not been rendered moot, although independent federal jurisdiction does not attach therefrom. *Carafas v. LaVallee*, 391 U.S. 234, 237 (1968), citing *Fiswick v. United States*, 329 U.S. 211, 222 (1946).

On February 26, 1973, respondent plead guilty to the charge of accessory after a felony murder and was sentenced to serve 21 years consecutive to the previously imposed 21 year sentence, thus resulting in a total of 42 years incarceration. (App. 4, 10-11) Pursuant to Ark. Stat. Ann. § 43-2829 (Repl. 1977, Supp. 1983), convicted persons who committed felonies prior to April 1, 1977, are eligible for release on parole in accordance with eligibility laws in effect at the time the crime was committed. Here the offense was committed in May 1970. See, also, *Easley v. State*, 274 Ark. 215, 623 S.W.2d 189 (1981) (sentencing procedure controlled by statutes in effect on date crime committed); *Davis v. Mabry*, 266 Ark. 487, 585 S.W.2d 949 (1979) (parole law in effect at time crime committed governs if application of latter law would operate to prisoner's disadvantage).

At the time of the offense, persons sentenced to a term of years were required to serve one-third (⅓) of the sentence imposed, with credit for good time allowances. Ark. Stat. Ann. § 43-2807 (c) (Supp. 1969). For purposes of parole eligibility, consecutive sentences were and are considered as a single commitment reflecting the cumulative minimum and maximum time to be served. Ark. Stat. Ann. § 43-2807 (2) (Supp. 1969, Repl. 1977).

In Arkansas, "parole" is defined as "the release of the prisoner to the community by the Board of Pardons and

Paroles prior to the expiration of his term, subject to conditions imposed by said Board and to its supervision." Ark. Stat. Ann. § 43-2801 (b) (Supp. 1969). A person so paroled, remains "in the legal custody of the institution from which he was released, but subject to the orders of the Board." Ark. Stat. Ann. § 43-2808 (Supp. 1969). Present state law contains language identical to the quoted passages. The cited state statutory provisions have been included in an attached Supplemental Appendix.

Information supplied to petitioner indicates that Johnson is subject to being released from the custody of the Arkansas Department of Correction March 17, 2009. This computation of time is based on Johnson's total sentence of 42 years. Petitioner suggests that if the challenged sentence is determined to be 21 years concurrent, Johnson would be subject to being released from custody March 17, 1988.

Relying on *Jones v. Cunningham*, 371 U.S. 236 (1963), the case before the Court is not moot inasmuch as respondent, admittedly on parole, remains in the legal custody of the Arkansas Department of Correction. See also, *Jones v. Mabry*, 476 F.Supp. 311 (E.D. Ark. 1979), *aff'd* 620 F.2d 307 (8th Cir. 1980) (writ of habeas corpus issued regarding prisoner on parole-release). Compare, *Cotton v. Mabry*, 674 F.2d 701 (8th Cir. 1982) (federal court did not have jurisdiction over a petition for writ of habeas corpus filed by Cotton who had served his sentence and was not on parole on basis of "collateral consequences" of conviction alone).

CONCLUSION

For these reasons and those stated in our opening brief, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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SUPPLEMENTAL APPENDIX

Arkansas law applicable at the time the offenses were committed is set forth as follows:

Ark. Stat. Ann. § 43-2801 (Supp. 1969)

> 43-2801. When used in this Act, unless the context otherwise requires:
>
> * * *
>
> (b) "Parole" is the release of the prisoner to the community by the Board of Pardons and Paroles prior to the expiration of his term, subject to conditions imposed by said Board and to its supervision. When a court or other authority has filed a warrant against the prisoner, said Board may release him on parole to answer the warrant of such court or authority. [Acts 1968 (1st Ex. Sess.), No. 50, § 23, p. 1646.]
>
> * * *

Ark. Stat. Ann. § 43-2802.1 (Supp. 1969)

> 43-2802.1. There is hereby created the State Board of Pardons and Paroles hereinafter referred to as the "Parole Board" to be composed of five (5) members to be appointed by the Governor and confirmed by the Senate.
>
> * * *

Ark. Stat. Ann. § 43-2804 (Supp. 1969)

> 43-2804. The Parole Board shall have the power to determine what persons shall be placed on parole and to fix the time and conditions of such parole. The Parole Board shall conduct open meetings and make public its findings for each eligible candidate for

parole. Inmate interviews may be closed to the public. All policies, rules and regulations regarding parole shall be formulated by the Parole Board. [Acts 1968 (1st Ex. Sess.), No. 50, § 25, p. 1646.]

* * *

Ark. Stat. Ann. § 43-2807 (Supp. 1969)

43-2807. (a) Death Sentence. Individuals under sentence of death shall not be eligible for release on parole.

(b) Life Imprisonment. (1) Individuals sentenced to life imprisonment prior to March 1, 1968, and those sentenced to life imprisonment after the effective date [February 12, 1969] of this Act, shall not be eligible for release on parole unless such sentence is commuted to a term of years by executive clemency. When such life sentence has been commuted to a term of years (in) the individual shall be eligible for release on parole after having served one-third (⅓) of the time to which the life sentence was commuted, with credit for good time allowances.

(2) Individuals sentenced to life imprisonment on and after March 1, 1968 and prior to the effective date [February 12, 1969] of this Act, shall be eligible for release on parole after having served fifteen (15) years of the sentence, with credit for good time allowances not to exceed five (5) years.

(c) Sentence of years. (1) Individuals sentenced to a term of years prior to March 1, 1968 and those sentenced to a term of years after the effective date [February 12, 1969] of this Act, shall be eligible for release on parole after having served one-third (⅓) of the time for which sentenced with credit for good time allowances or one-third (⅓) of the time to which such sentence is commuted by executive clemency, with credit for good time allowances.

(2) Individuals sentenced to a term of years on and after March 1, 1968, and prior to the effective date [February 12, 1969] of this Act, shall be eligible for release on parole at any time, unless a minimum time to be served, consisting of not more than one-third (1/3) of the total time sentenced, is imposed. In the event a minimum time to be served is imposed, the individual shall be eligible for release on parole after serving the minimum time with credit for good time allowances, and commutation by exercise of executive clemency.

Any person under the age of twenty-one (21) years who is first convicted of a felony and committed to the First Offenders Penal Institution or to the Department of Correction for a term of years, shall be eligible for parole at any time, unless a minimum time to be served, consisting of not more than one-third (1/3) of the total time sentenced is imposed. In the event such individual is sentenced to a minimum time to be served, he shall be eligible for release on parole after serving the minimum time prescribed with credit for good time allowances, and commutation by exercise of executive clemency.

For parole eligibility purposes, consecutive sentences by one or more courts, or for one or more counts, shall be considered as a single commitment reflecting the cumulative minimum and maximum time to be served. [Acts 1968 (1st Ex. Sess.), No. 50, § 28, p. 1646; 1969, No. 48, § 1, p. 57; 1969, No. 94, § 1, p. 263.]

Ark. Stat. Ann. § 43-2808 (Supp. 1969)

43-2808. The Parole Board may release on parole any individual eligible under the provisions of Section 28 [§ 43-2807] confined in any correctional institution administered by the State Department of Correction, when in its opinion there is reasonable probability the prisoner can be released without

detriment to the community or himself. All paroles shall issue upon order of the Parole Board, duly adopted.

Before ordering the parole of any prisoner, the Parole Board shall have the prisoner appear before it and shall interview him. The parole shall be ordered only for the best interest of society, not as an award of clemency; it shall not be considered a reduction of sentence or pardon. A prisoner shall be placed on parole only when the Parole Board believes that he is able and willing to fulfill the obligations of a law-abiding citizen. Every prisoner while on parole shall remain in the legal custody of the institution from which he was released, but subject to the orders of the Board. [Acts 1968 (1st Ex. Sess.), No. 50, § 29, p. 1646.]

Ark. Stat. Ann. § 43-2810 (Supp. 1969)

43-2810. At any time during release on parole the Parole Board may issue a warrant for the arrest of a released prisoner for violation of any conditions of release, or a notice to appear to answer a charge of a violation. Such warrant or notice shall be served personally upon the individual. A warrant shall authorize all officers named therein to return the prisoner to the actual custody of the penal institution from which he was paroled, or to any suitable detention facility while awaiting further transfer to said institution. Any parole or probation officer may arrest such prisoner without a warrant, or may deputize any officer with power of arrest to do so by giving him a written statement setting forth that the prisoner has in the judgment of the probation or parole officer violated the conditions of his release. The written statement delivered with the prisoner by the arresting officer to the official in charge of the institution to which the prisoner is brought for detention shall be sufficient warrant for detaining him. After making an arrest, the parole or probation officer shall present to the detaining authorities a

similar statement of circumstances of violation. Pending hearing, as hereinafter provided, upon any charge of violation, the prisoner shall remain incarcerated in the institution.

Upon arrest and detention, the parole or probation officer making the arrest shall immediately notify the Parole Board and shall submit in writing a report showing in what manner the prisoner violated the conditions of release. Thereupon, or upon an arrest by a warrant as herein provided, the Parole Board shall cause the prisoner to be promptly brought before it for a hearing on the violation charged, under such rules and regulations as the Parole Board may adopt. If the violation is established, the Parole Board may continue or revoke the parole, or enter such other order as it may see fit.

A prisoner for whose return a warrant has been issued by the Parole Board shall, if it is found that the warrant cannot be served, be deemed a fugitive from justice. If it shall appear that he has violated the provisions of his release, the Parole Board shall determine whether the time from the issuance of the warrant to the date of his arrest, or any part of it, shall be counted as time served under the sentence. [Acts 1968 (1st Ex. Sess.), No. 50, § 31, p. 1646.]

Ark. Stat. Ann. § 43-2813 (Supp. 1969)

43-2813. Time served shall be deemed to begin on the day sentence is imposed, not on the day a prisoner is received by the Department of Correction and shall continue only during the time or times in which a prisoner is actually confined in a county jail or other local place of lawful confinement or while under the custody and supervision of the Department of Correction; provided, however, that the sentencing judge may in his discretion direct, when he imposes sentence, that time already served by the defendant in jail or other place of detention, shall be credited against the sentence. [Acts 1968 (1st Ex. Sess.), No. 50, § 34, p. 1646.]

Corresponding Arkansas law presently in effect is set forth below:

> Ark. Stat. Ann. § 43-2801 (Repl. 1977) — When used in this Act, unless the context otherwise requires:
>
> * * *
>
> (b) "Parole" is the release of the prisoner to the community by the Board of Pardons and Paroles prior to the expiration of his term, subject to conditions imposed by said Board and to its supervision. When a court or other authority has filed a warrant against the prisoner, said Board may release him on parole to answer the warrant of such court or authority. [Acts. 1968 (1st Ex. Sess.), No. 50, § 23, p. 1646.]

Ark. Stat. Ann. § 43-2808 (Repl. 1977)

> § 43-2808. The Parole Board may release on parole any individual eligible under the provisions of Section 28 [§ 43-2807] confined in any correctional institution administered by the State Department of Correction, when in its opinion there is reasonable probability the prisoner can be released without detriment to the community or himself. All paroles shall issue upon order of the Parole Board, duly adopted.
>
> Before ordering the parole of any prisoner, the Parole Board shall have the prisoner appear before it and shall interview him. The parole shall be ordered only for the best interest of society, not as an award of clemency; it shall not be considered a reduction of sentence or pardon. A prisoner shall be placed on parole only when the Parole Board believes that he is able and willing to fulfill the obligations of a law-abiding citizen. Every prisoner while on parole shall remain in the legal custody of the institution from which he was released, but subject to

the orders of the Board. [Acts 1968 (1st Ex. Sess.), No. 50, § 29, p. 1646.]

Ark. Stat. Ann. § 43-2829 (Repl. 1977)

43-2829. A. Persons who committed felonies prior to April 1, 1977, and were convicted and incarcerated for the same, shall be eligible for release on parole in accordance with the parole eligibility law in effect at the time such crime was committed.

* * *

E. For parole eligibility purposes, consecutive sentences by one or more courts, or for one or more counts, shall be considered as a single commitment reflecting the cumulative sentence to be served.

* * *

Ark. Stat. Ann. § 43-2830 (Repl. 1977)

43-2830. It is the purpose and intent of this Act [§§ 43-2828 – 43-2830] to establish the parole eligibility for persons who are convicted of felonies committed on and after April 1, 1977. Nothing in this Act shall be construed to repeal the parole eligibility laws in effect on the date criminal offenses were committed prior to April 1, 1977. [Acts 1977, No. 93, § 3, p. __.]

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No. 83-328

In the Supreme Court of the United States

OCTOBER TERM, 1983

JAMES MABRY, COMMISSIONER, ARKANSAS DEPARTMENT OF CORRECTION, PETITIONER

v.

GEORGE JOHNSON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether respondent is constitutionally entitled to specific performance of a plea proposal made by the prosecution, but withdrawn before he entered a plea or otherwise acted in reliance on it.

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In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-328

JAMES MABRY, COMMISSIONER, ARKANSAS DEPARTMENT OF CORRECTION, PETITIONER

v.

GEORGE JOHNSON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

This case presents an important issue regarding the enforceability of a plea proposal withdrawn by a prosecutor before the defendant has entered a plea or otherwise acted in reliance on it. The courts of appeals that have addressed the question are in conflict. Because guilty pleas and their negotiation play such a prominent role in the federal criminal justice system, the United States has a substantial interest in the outcome of this case.[1]

[1] Guilty pleas account for the vast majority of all criminal convictions in federal courts. In the calendar year ending June 30, 1983, of 35,591 criminal convictions in the United States district courts, 30,523, or 86%, were by pleas of guilty or nolo contendere. *Report of Director of Administrative Office of United States Courts for Period July 1, 1982-June 30, 1983* App. Table D-4.

STATEMENT

1. In May 1970, respondent and another man broke into the house of W.A. Siscoe with intent to burglarize it. While the burglary was in progress, the Siscoes and their daughter Vicki returned to the house. Vicki entered the house first and confronted the burglars. Responding to her screams, Mr. Siscoe entered the house. One of the intruders threatened to kill Mr. Siscoe and grabbed Vicki to shield his escape. Mr. Siscoe and one of the intruders exchanged shots. Vicki was fatally wounded, and Mr. Siscoe and respondent were wounded. Pet. App. A2; see *Johnson* v. *State*, 252 Ark. 1113, 482 S.W. 2d 600 (1972). Respondent was convicted of first degree murder and sentenced to life imprisonment. He was subsequently convicted on charges of burglary and assault with intent to kill and sentenced to concurrent 21-year and 12-year terms of imprisonment, respectively. Following sentencing on the burglary and assault charges, the Arkansas Supreme Court reversed respondent's murder conviction for failure to give a requested jury instruction and remanded for a new trial. Pet. App. A2; 252 Ark. at 1120, 482 S.W.2d at 606.

After remand, Harold Hall, a public defender, was appointed to represent respondent. On Friday, October 27, 1972, the prosecutor contacted Hall and proposed to recommend a 21-year sentence, to be served *concurrently* with respondent's burglary and assault sentences, in exchange for a guilty plea to being an accessory after a felony murder. Hall informed respondent the next day of the proposed terms, and respondent agreed to accept them. The following Monday, October 30, 1972, Hall called the prosecutor and accepted the proposed plea. However, the prosecutor explained that a mistake had been made. He withdrew the plea offer and proposed instead to recommend a 21-year sentence to be served *consecutively* to respondent's other sentences. Hall never responded to this second proposal. Pet. App. A2-A3.

Represented by another public defender, respondent proceeded to trial on November 8, 1972, but a mistrial was declared because of prejudicial newspaper publicity.

After further continuances respondent agreed to a plea bargain on essentially the same terms as the modified proposal put to Hall on October 30, 1972. Respondent entered a plea of guilty on February 26, 1973, to a charge of accessory after a felony murder and was sentenced to 21 years' imprisonment to run consecutively to the burglary and assault sentences. Pet. App. A3.

2. Respondent sought and was denied post-conviction relief in the state courts on the grounds of mistake and ineffective assistance of counsel. *Johnson* v. *State*, No. CR-78-18 (Ark. June 5, 1978) (unpublished opinion). He then filed a motion under 28 U.S.C. 2254 in the United States District Court for the Eastern District of Arkansas on essentially the same grounds. Pet. Supp. App. 4. The matter was referred to a magistrate for an evidentiary hearing, report, and recommendation. After the initial hearing, respondent raised the additional claim that he is constitutionally entitled to specific performance of the prosecutor's withdrawn plea proposal of October 27, 1972. Pet. App. A4; Pet. Supp. App. 15.

In his final recommendation, which was adopted by the district court (Pet. Supp. App. 2), the magistrate rejected all of respondent's contentions. He dismissed respondent's claim of entitlement to performance of the October 27, 1972, proposed plea, relying on *Virgin Islands* v. *Scotland*, 614 F.2d 360 (3d Cir. 1980). He declined to follow the conflicting authority of *Cooper* v. *United States*, 594 F.2d 12 (4th Cir. 1979). Pet. App. A5-A6; Pet. Supp. App. 16-20.[2]

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[2] The district court adopted the magistrate's conclusion that respondent had exhausted his available state remedies, since Arkansas courts will not permit successive petitions for collateral relief in non-capital cases. Pet. Supp. App. 16. The court of appeals affirmed that conclusion. Pet. App. A6 n.6. The State does not challenge that holding.

The district court also adopted a finding that the attorney who represented respondent *after* the plea proposal at issue here was withdrawn, John Achor, had breached his duty to act as a reasonally competent attorney by failing to interview certain witnesses (Pet. Supp. App. 11), but that this did not result in any prejudice to respondent (*id.* at 15). Since this finding concerned

On appeal, a divided panel of the Eighth Circuit reversed, adopting the reasoning of *Cooper*. The court acknowledged that this is "a fact situation that falls short of a plea bargain" (Pet. App. A8 (footnote omitted)) and that respondent had neither "enter[ed] a plea of guilty in court" nor "performed any specific action in reliance upon the plea bargain" (*ibid.*).[3] Nonetheless, the court concluded that a criminal defendant has " 'a constitutional right to enforcement of plea proposals [which] may arise before any technical "contract" has been formed, and on the basis alone of expectations reasonably formed in reliance upon the honor of the government in making and abiding by its proposals.' " *Id.* at A10 (quoting *Cooper*, 594 F.2d at 16-18 (brackets in original)). The court based this right on two constitutional principles: the substantive due process right of "fundamental fairness" set forth in *Santobello* v. *United States*, 404 U.S. 257 (1971), and the Sixth Amendment right to effective assistance of counsel.

The court limited its holding, as did the Fourth Circuit in *Cooper*, to cases in which the defendant has "promptly and unequivocally" agreed to the government's proposal. Pet. App. A13. It reaffirmed the government's right to make conditional proposals and to "withdraw or modify outstanding proposals that have not been accepted or rejected after a reasonable period of time." *Ibid.* Finally, it stated that "the government can withdraw a plea proposal or reopen plea negotiations, even after a plea proposal has been accepted by the defendant, if the government demonstrates that the plea proposal was based upon inaccurate or incomplete information." *Ibid.*

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a different attorney, it has no bearing on the plea negotiations between the State and Harold Hall, respondent's previous counsel.

[3] Although the court of appeals stated that "[respondent] did rely on the plea proposal to the extent that he considered the terms offered, agreed to accept the plea proposal and communicated his willingness to plead guilty to the prosecuting attorney" (Pet. App. A10), it apparently was not suggesting that these actions

On the basis of this analysis, the court held that respondent is entitled to be sentenced in accordance with the prosecutor's proposed recommendation.[4]

SUMMARY OF ARGUMENT

The issue is whether a plea proposal, once made but thereafter withdrawn by the prosecution during plea negotiations, is enforceable by specific performance even though the defendant has neither entered a plea nor otherwise acted to his detriment in reliance on it. We submit that it is not.

A.1. *Santobello* v. *New York*, 404 U.S. 257 (1971), safeguards the defendant's rights to a "voluntary and knowing" waiver of the constitutional protections of the criminal trial process by requiring that the government abide by its side of the bargain when the defendant pleads guilty in reliance on a plea agreement. The rights and interests at stake in *Santobello* are wholly absent here, where the defendant has not waived his rights or otherwise acted in reliance on the plea proposal.

Nonetheless, the court of appeals inferred from *Santobello*'s requirement of "fairness" a constitutional right to bind the government to performance of unconsummated plea proposals. The court's analysis, however, begs the question: unless the defendant is legally entitled to view a proposal as irrevocable, the principle of "fundamental fairness" does not preclude its revocation. The parties here had no reason to assume that the prosecutor's misstated proposal would be binding merely because the defendant had decided to accept it, since under contract principles and analogous plea bargaining practice a plea proposal becomes binding only upon performance or detrimental reliance by the defendant. Contract law principles embody the legal system's effort to

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amounted to "detrimental reliance" as that term is used in the law of contracts.

[4] Judge Gibson dissented, both on the ground that *Scotland* should be followed instead of *Cooper* (Pet. App. A17-A18), and on the ground that this case is distinguishable from *Cooper* on its facts. *Id.* at A15-A17.

establish fair rules for determining the rights of bargaining parties, and the court's rejection of the contract law analogy cannot reasonably be thought to be required by due process.

2. The court of appeals' reliance on the subjective hopes and expectations of the defendant offers no coherent and consistent principle for interpretation of due process requirements. Hopes and expectations may be raised—or dashed—by any number of developments during plea bargaining. Yet the very premise of the plea bargaining process, as reflected in Fed. R. Crim. P. 11(e), is that the defendant's rights are adequately protected by the right to withdraw his plea if the bargain does not work out.

3. Nor is the court of appeals' decision justifiable as a prophylactic rule to prevent prosecutorial abuse. The best protection against abuse resides in the natural safeguards of the adversarial plea bargaining process. Any abuse that amounts to a due process violation can be remedied on a case-by-case basis.

4. The court of appeals' invocation of the Sixth Amendment right to effective assistance of counsel is beside the point. Sixth Amendment rights are not endangered merely because the results of defense counsel's efforts may be disappointing to the defendant.

B. The court of appeals' conclusion that a criminal defendant has a constitutional right to enforcement of government plea proposals, prior to performance or reliance of any kind, is in fact inconsistent with *Santobello* and its progeny, which hold that rescission of a guilty plea is a constitutionally adequate remedy for breach of a plea agreement that has been performed by the defendant, in the absence of special factors, such as substantial reliance or prejudice, that would require specific performance. If specific performance is not available as a matter of constitutional right to protect the expectation interests of defendants who have performed their side of the bargain, it follows *a fortiori* that the expectation interests of a defendant who has

neither performed nor acted in reliance on a plea proposal are entitled to no more.

C. Sound reasons of policy also urge reversal. The court of appeals' holding introduces uncertainty and subjectivity into the question of plea bargains, thereby frustrating one of the key purposes of Rule 11(e) of the Federal Rules of Criminal Procedure and analogous state rules and threatening to burden the courts with a barrage of difficult-to-adjudicate claims relating to alleged unfulfilled plea offers. Moreover, it interferes unnecessarily with judicial sentencing discretion and prosecutorial discretion and prevents the correction of good faith errors and misstatements, to the detriment of society's interest in exacting fair punishment for violations of the laws.

ARGUMENT

It goes without saying that the government should abide by its bargains. The issue here is *when* an enforceable bargain has been struck. The court of appeals has frankly acknowledged that the situation here "falls short of a plea bargain." Pet. App. A8 (footnote omitted). The court has also conceded that no contract between respondent and the prosecutor concerning a plea bargain had been formed. *Id.* at A10; see also *id.* at A12-A13. And the court recognized that respondent "has not performed any specific action in reliance upon the plea bargain." *Id.* at A8. Nonetheless, "on the basis alone of [respondent's] expectations" (*id.* at A10 (citation omitted)), the court required the State to confer the benefits of a plea *proposal* made by mistake and promptly withdrawn.

The decision below relied heavily on *Cooper* v. *United States*, 594 F.2d 12 (4th Cir. 1979).[5] It is also con-

[5] The factual circumstances in *Cooper* differ from those here in four major respects: (1) in *Cooper* the prosecutor withdrew his plea proposal *before* defense counsel could communicate his acceptance, whereas here the acceptance was communicated first; (2) in *Cooper* the prosecutor pledged that the offer would be held open for a week (594 F.2d at 15 n.2), while no such pledge was made in

sistent with *United States* v. *Calabrese*, 645 F.2d 1379, 1389-1390 (10th Cir.), cert. denied, 451 U.S. 1018, 454 U.S. 831 (1981), in which the Tenth Circuit held that "once the government acknowledges the existence of an agreement," it must comply until it obtains a judicial determination that the defendant breached the agreement. *Id.* at 1390. See also *United States* v. *Lieber*, 473 F. Supp. 884 (E.D.N.Y. 1979); *Ex parte Yarber*, 437 So.2d 1330 (Ala. 1983); *Kisamore* v. *State*, 286 Md. 654, 409 A.2d 719 (1980); cf. *State* v. *Johnson*, 23 Wash. App. 490, 497, 596 P.2d 308, 312 (1979) (purportedly following *Cooper*, but defendant's partial performance might have entitled him to performance under *Scotland*).

On the other hand, the decision below is directly contrary to *Virgin Islands* v. *Scotland*, 614 F.2d 360 (3d Cir. 1980), and *United States* v. *Greenman*, 700 F.2d 1377 (11th Cir. 1983), cert. denied, No. 83-159 (Nov. 28, 1983), which held that, in the absence of detrimental reliance or prejudice, a defendant is not entitled to enforcement of a plea offer if he is aware of the government's intention not to comply with the proposed agreement before he pleads guilty. See also *Siegel* v. *New York*, 691 F.2d 620, 624 (2d Cir. 1982), cert. denied, No. 82-1108 (Feb. 22, 1983) (defendant may not reasonably rely on any promises made off the record); *United States* v. *Goodrich*, 493 F.2d 390, 393 (9th Cir. 1974) (emphasis added) ("when the prosecution makes a 'deal' within its authority *and the defendant relies on it in good faith*, the court will not let the defendant be prejudiced as a result of that reliance"). The decision is also contrary to *United States* v. *Ocanas*, 628 F.2d 353, 358 (5th Cir. 1980), and *United States* v. *Aguilera*, 654 F.2d 352, 353-354 (5th

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this case; (3) in *Cooper* the offer was properly made but overruled by higher authority, whereas here the offer was made by mistake; and (4) in *Cooper* the offer was reasonable on its face, while here the offer of, in effect, no enhanced sentence for a crime which previously had resulted in conviction for first degree murder was suspect on its face.

Cir. 1981), which held that "either party [prosecutor or defendant] should be entitled to modify its position" until a plea has been accepted by the court, and to numerous state decisions, which, like *Scotland*, have held that plea proposals are unenforceable in the absence of detrimental reliance or other objective prejudice to the defendant.[6]

We believe that *Scotland* and cases similar to it present the better view, and thus that the court of appeals should be reversed.

A. Withdrawal Of A Plea Bargain Before The Defendant Has Taken Action In Reliance On It Violates Neither Due Process Guarantees Nor The Right To Effective Assistance Of Counsel

1. In requiring performance of the withdrawn plea proposal in this case, the court of appeals has, we believe, followed its " 'personal and private notions' of fairness"—unjustified ones at that—rather than the more limited " 'fundamental conceptions of justice' " which underlie the Due Process Clause. See *United States* v. *Lovasco*, 431 U.S. 783, 790 (1977) (quoting *Rochin* v. *California*, 342 U.S. 165, 170 (1952), and *Mooney* v. *Holohan*, 294 U.S. 103, 112 (1935)). The starting point in our analysis is this Court's decision in *Santobello* v. *New York*, 404 U.S. 257 (1971).

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[6] *People* v. *Barnett*, 113 Cal. App. 3d 563, 170 Cal. Rptr. 255 (1980); *Shields* v. *State*, 374 A.2d 816, 819-820 (Del.), cert. denied, 434 U.S. 893 (1977), *State* v. *Reasbeck*, 359 So. 2d 564, 565 (Fla. Dist. Ct. App. 1978); *People* v. *Young*, 52 Ill. App. 3d 671, 674, 367 N.E.2d 976, 978 (1977); *State* v. *Edwards*, 279 N.W.2d 9, 11-12 (Iowa 1979); *Cope* v. *Commonwealth*, 645 S.W.2d 703, 704 (Ky. 1983); *State* v. *Caminita*, 411 So. 2d 13, 16 (La.), cert. denied, (Iowa 1979); *Cope* v. *Commonwealth*, 645 S.W.2d 703, 704 (Ky. 459 U.S. 976 (1982); *Wynn* v. *State*, 22 Md. App. 165, 172-173, 322 A.2d 564, 568 (1974) (principle modified by *State* v. *Brockman*, 277 Md. 687, 697-700, 357 A.2d 376, 383-384 (1976)); *Commonwealth* v. *Smith*, 427 N.E.2d 739, 742 (Mass. 1981); *People* v. *Heiler*, 79 Mich. App. 714, 262 N.W.2d 890 (1977); *State* v. *Collins*, 300 N.C. 142, 148-149, 265 S.E.2d 172, 176 (1980); *State* v. *Bero*, 645 P.2d 44 (Utah 1982); *State ex rel. Gray* v. *McClure*, 242 S.E.2d 704 (W. Va. 1978); *State* v. *Beckes*, 100 Wis. 2d 1, 300 N.W.2d 871 (Ct. App. 1980).

Santobello held that "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." 404 U.S. at 262. This holding is grounded in the requirement that a "guilty plea [be] knowingly and voluntarily made." *Blackledge* v. *Allison*, 431 U.S. 63, 75-76 n.8 (1977); see *Santobello*, 404 U.S. at 261-262; *id.* at 264-266 (Douglas, J., concurring); *Brady* v. *United States*, 397 U.S. 742, 754-755, 756-757 (1970). "[A] guilty plea is a serious and sobering occasion inasmuch as it constitutes a waiver of the fundamental rights to a jury trial, to confront one's accusers, to present witnesses in one's defense, to remain silent, and to be convicted by proof beyond all reasonable doubt." *Santobello*, 404 U.S. at 264 (Douglas, J., concurring) (citation omitted). A guilty plea must therefore be made only by " 'one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel.' " *Brady*, 397 U.S. at 755 (quoting *Shelton* v. *United States*, 246 F.2d 571, 572 n.2 (5th Cir. 1957) (en banc), rev'd on other grounds, 356 U.S. 26 (1958)). If the plea is induced by " 'unfulfilled or unfulfillable promises' " (*ibid.*), then it cannot be considered knowing and voluntary.

These considerations are wholly absent from this case. Respondent was not induced to plead guilty [7] or to waive his constitutional rights in return for an unfulfilled or unfulfillable promise. Indeed, he did not perform any specific action whatsoever in reliance on the proposal. Pet. App. A8; see *Cooper*, 594 F.2d at 18 n.8. The State's actions in this case, therefore, fully comported with the principles of *Santobello*.

Nonetheless, the court of appeals found that the " 'fairness' requirement set forth in *Santobello*" can be read to

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[7] After the prosecutor withdrew the original proposal and corrected his misstatement, defense counsel did not respond. Respondent later stood trial, and only after a mistrial was declared did he accept the State's revised terms and plead guilty. Pet. App. A3.

require the government to honor, not just the terms of a consummated plea agreement, as in *Santobello*, but of a plea proposal as well. Pet. App. A12-A13. But the court of appeals' notion of "fairness" begs the question: we can readily agree that the defendant should have a remedy for breach of a binding promise, but the opinion provides no coherent or consistent basis for determining *when* a proposal becomes a binding and irrevocable promise. And absent a prior understanding that a proposal that the offeree has decided to accept is irrevocable, there is nothing "unfair" about revoking it. As we survey the possible points in the plea negotiations process at which the plea proposal could be deemed binding—at the oral offer, the oral acceptance, the written reduction of terms, the time of reliance, the actual plea, the acceptance by the court, the pronouncement of sentence; there may be others [8]—we do not see why "fundamental fairness" should preclude adoption of any of the alternatives (so long as a known rule is consistently followed), at least up to the point where the defendant pleads guilty or otherwise acts to his detriment in reliance on the bargain. Only at that point, we submit, could due process considerations come into play.

While recognizing that issues of constitutional rights cannot be made subordinate to the rules of commerce (cf. *Brewer* v. *Williams*, 430 U.S. 387, 401 n.8 (1977)), we submit that contract law—the function of which is, after all, fairly to define the rights of bargaining parties—is a useful, natural, and sensible source of guidance in a case like this.[9] See *United States* v. *Carrillo*, 709 F.2d 35, 36

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[8] Indeed, the court below appears to have adopted a variation, or variations: the government's oral offer is binding upon being made, but only if accepted within "a reasonable period of time," and only if more "[ ]accurate or [ ]complete information" does not become available to the government. Pet. App. A13.

[9] Since the extensive corpus of contract law must of necessity include rules that define rights even for close cases in which a different rule might still be said to be "fair," whereas due process concepts reach only actions aptly characterized as "fundamentally"

& n.1 (9th Cir. 1983); *Brooks* v. *United States*, 708 F.2d 1280, 1281 (7th Cir. 1983).[10]

And it seems agreed (see Pet. App. A10; *Cooper*, 594 F.2d at 16; *Scotland*, 614 F.2d at 364) that under traditional contract principles no binding agreement was formed here. A plea bargain is essentially a form of unilateral executory contract; the government's promise becomes binding only upon performance or detrimental reliance by the defendant. *Scotland*, 614 F.2d at 364. Even after the defendant has indicated his agreement with its terms, the plea offer cannot be considered a bilateral contract—an exchange of a promise for a promise—because the defendant is not bound by his "acceptance." He does not "promise"—in any contractual sense of the term—to plead in accordance with the agreement, since he is perfectly free up to the time he actually pleads to change his mind and to stand trial (or to negotiate for a more favorable plea bargain). The government thus receives no consideration for its "promise" to perform, and under the law of contracts is free to withdraw the offer until the defendant performs his side of the bargain.[11]

This result comports with the principle of fairness in its central sense of evenhandedness. As one court has expressed it:

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unfair, there may be many circumstances in which the Constitution does not hold the government to the law of contracts. But cases in which due process confers rights not available under contract law should be rare indeed.

[10] The court of appeals acknowledged that "[t]he analogy between contracts and plea agreements works well in the usual plea bargain case" (Pet. App. A8), but concluded that "[t]raditional contract principles * * * are of little guidance" here (*ibid.*)—for no apparent reason other than that they lead to the conclusion that there was no binding obligation on the State. But we believe that contract principles—particularly the doctrine of promissory estoppel or detrimental reliance—aptly capture the justice of the case.

[11] The doctrine of mistake might also have application in the circumstances of this case, where the prosecutor's initial offer seems to have resulted from an inadvertent misstatement.

> Obviously the State could not specifically enforce an agreement by requiring a defendant to plead guilty if before doing so he had a change of heart. Our sense of justice is not affronted by denying that privilege to the defendant as well.

Wynn v. *State*, 22 Md. App. 165, 173, 322 A.2d 564, 568 (1974).

Under the contractual doctrine of detrimental reliance or promissory estoppel, detrimental reliance on a promise is treated as if it were consideration; the effect is to estop the offeror from revoking his proposal. This solves the problems that otherwise would occur if the offeror were permitted to revoke his offer after the offeree had partially performed or substantially changed his position to his detriment in reliance on the offer. In the plea bargaining context, the doctrine of detrimental reliance would fully vindicate the rights of the accused and cure any unfairness resulting from the government's ability to revoke its nonbinding unilateral offer. See *Goodrich*, 493 F.2d at 393.[12]

An example of detrimental reliance might be a defendant's cooperation with law enforcement officials by testifying or providing valuable information, or by mak-

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[12] The precise limits of this position need not be fleshed out in this case. The *Scotland* court would make a plea proposal enforceable only where the defendant "has relied on the bargain in such a way that a fair trial would no longer be possible." 614 F.2d at 365. As noted in text, we believe there are circumstances where a defendant might become entitled to enforcement of a proposal because of detrimental reliance, such as cooperating with law enforcement officials, even though the reliance would not detract from the fairness of trial. See *State* v. *Brockman*, 277 Md. 687, 697-700, 357 A.2d 376, 383-384 (1976). Other courts take the position that, in the absence of other reliance or prejudice, a plea agreement becomes binding on the parties only when it is accepted by the court. *E.g.*, *Aguilera*, 654 F.2d at 353-354; *Ocanas*, 628 F.2d at 358; *Heiler*, 79 Mich. App. at 720, 262 N.W.2d at 894. This case does not present these issues, however, for respondent did not take any specific action whatsoever in reliance on the misstated proposal, and the proposed plea was never tendered to the court.

ing restitution to victims. If the government has bargained for such actions, in return for which it would receive a guilty plea and recommend a light sentence or dismissal of other charges, and if the defendant has cooperated in reliance on the bargain, the circumstances may be such that the government should not thereafter be permitted to renege on the concessions it has offered to induce the defendant's actions. See *United States* v. *Carrillo*, 709 F.2d 35, 37 (9th Cir. 1983); *State* v. *Brockman*, 277 Md. 687, 357 A.2d 376 (1976); *State* v. *Kuchenreuther*, 218 N.W.2d 621 (Iowa 1974).[13]

In some instances, the reliance may be less active. For example, a defendant might be induced by a plea proposal to neglect preparation for his defense; in such a case, the mere passage of time without trial preparation might constitute detrimental reliance.[14] Moreover, a due process claim might be made out upon a showing that the government's conduct in the plea bargaining negotiations was motivated by bad faith or an attempt to gain undue advantage over the defendant. Cf. *United States* v. *Goodwin*, 457 U.S. 368 (1982); *Bordenkircher* v. *Hayes*, 434 U.S. 357, 363 (1978).

Under these standards, the instant case is easy to resolve. Here it is admitted that respondent took no specific action in reliance on the government's offer. The prosecutor's offer was communicated to him on Saturday; on Monday it was withdrawn and corrected. None of respondent's rights or interests was prejudiced in any way by the incident, and there is no suggestion of prosecutorial bad faith or abuse. From the sequence of events, it would appear that a deputy prosecutor innocently mis-

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[13] This assumes, of course, that the defendant is willing to complete performance of his side of the bargain.

[14] But see *People* v. *Ciatti*, 17 Mich. App. 4, 7-8, 168 N.W.2d 902, 903 (1969) (because plea could be rejected by court, "defendant's attorney could not properly rely on any agreement with the prosecutor as a reason for being unprepared").

spoke when he offered "concurrent" rather than "consecutive" terms. While we can understand respondent's regret that he could not take advantage of the prosecutor's momentary confusion—which would effectively have left him with no punishment for a serious crime—we cannot agree that he suffered any detriment that would entitle him, as a matter of due process, to do so.

2. Acknowledging the lack of any specific reliance in this case, the court of appeals held that the plea proposal became enforceable "on the basis alone of [respondent's] expectations" (Pet. App. A10). This is a significant deviation from the contractual doctrine of detrimental reliance, since the latter refers only to specific objective changes in position resulting from the offer. So it is with plea proposals. "Analogous to promissory estoppel, plea bargaining must have more substantiality than mere expectation and hope. It must have explicit expression and reliance and is measured by objective, not subjective, standards." *Johnson* v. *Beto*, 466 F.2d 478, 480 (5th Cir. 1972); see *Greenman*, 700 F.2d at 1379 n.1; *Aguilera*, 654 F.2d at 354; *Ocanas*, 628 F.2d at 358; *United States* v. *Futeral*, 539 F.2d 329, 331 (4th Cir. 1975).

The court of appeals' reliance on respondent's "personal expectations" (Pet. App. A10) has a curious self-fulfilling quality about it. So far as the record shows, respondent was not particularly surprised at the prosecutor's withdrawal of the misstated proposal. If he felt aggrieved or deprived of the benefits of a rightful bargain, he made no serious attempt to do anything about it. The most likely explanation is that he and his counsel were aware of the prosecutor's inadvertent confusion of the terms "concurrent" and "consecutive," and anticipated that the proposal might be corrected. So far as the record shows, respondent did not bring the incident to the attention of the deputy prosecutor's superiors. He did not attempt to obtain performance of the proposal from the trial court, or during subsequent plea sessions. Nor did he raise the issue on appeal, in the course of state collateral review, or

in his original habeas petition in federal district court.[15] Only when *Cooper* was decided by the Fourth Circuit—nine months after the Arkansas Supreme Court affirmed the denial of collateral relief—did respondent think to assert that his expectations had been unconstitutionally defeated. From the sequence of events, it appears that it was the decision in *Cooper*—not the tendered plea proposal—that aroused respondent's expectations. If the court of appeals is affirmed, however, we may confidently predict that prisoners and defendants all across the land will come to have "reasonable expectations" that an oral plea proposal, once made, will be deemed binding on the government.

The *Cooper* court warned against the "beguiling precision" (594 F.2d at 18) of contract law, but its concept of "expectation interests" (*id.* at 20) is simply too vague and elastic to serve as a substitute. A defendant's hopes and expectations may be aroused—or dashed—by all manner of statements and actions during the plea bargaining process. A defendant may become hopeful at the advent of plea negotiations, only to be disappointed when the prosecutor ultimately decides not to close a deal. This does not give rise to a constitutional right to a bargained plea. See *Weatherford* v. *Bursey*, 429 U.S. 545, 561 (1977). A prosecutor may well make a promise that does not amount to a plea bargain; but the fact that the defendant's "personal expectations" may be deflated if the promise is broken does not render that promise enforceable. See *Roe* v. *United States Attorney*, 618 F.2d 980 (2d Cir.), cert. denied, 449 U.S. 856 (1980).[16] Most

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[15] Although the issue has not been preserved or presented to this Court by petitioner, we note that respondent's claim arguably was thrice defaulted: when he pled guilty without protest; when he failed to appeal; and when he failed to include the claim in his state collateral attack proceeding.

[16] In *Roe*, the prosecutor made a promise to a prisoner concerning place of confinement *after* the prisoner had supplied valuable information. Despite the "false expectations" (618 F.2d at 982)

commonly of all, the prosecutor may agree to recommend a particular sentence, and the defendant may thereby be induced to plead guilty. But if the judge declines to accept the plea agreement, the remedy, if any, is merely to permit the defendant to withdraw his plea. See *United States* v. *Yates*, 698 F.2d 828, 829-830 (6th Cir. 1983), cert. denied, No. 82-6317 (Apr. 4, 1983); *United States* v. *Mercer*, 691 F.2d 343, 345 (7th Cir. 1982); *United States* v. *Adams*, 634 F.2d 830 (5th Cir. 1981); Fed. R. Crim. P. 11(e)(2), (4).[17] There is no protection for the defendant's "expectation interests" any more than for the precisely parallel expectation interests of any other offeree of a unilateral contract prior to performance or detrimental reliance.

Since the expectations of the defendant are not a sufficient basis for making plea proposals enforceable in other contexts, we submit that the court of appeals was in error when it found that respondent's expectations "alone" could provide a basis for making the prosecutor's misstated proposal here binding and enforceable. To the contrary, it is well settled that liberty or property interests protected by the Due Process Clause do not derive from a person's "unilateral hope" (*Connecticut Board of Pardons* v. *Dumschat*, 452 U.S. 458, 465 (1981)); to be protected, expectations must be grounded in statute, regulation, or some other source of law (*ibid.*), such as contract law.

3. Nor does the need to "discourage the potential abuse of the plea bargaining process" (Pet. App. A14) justify

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raised by the promise, the court concluded that performance of it was not constitutionally required. The promise was "gratuitous, and there was no detrimental reliance" (*ibid.*).

[17] Under federal practice, a defendant must be permitted to withdraw a plea if the trial court declines to agree to dismissal of charges (Fed. R. Crim. P. 11(e)(1)(A)) or to a specific disposition of the case (Rule 11(e)(1)(C)). A defendant is not entitled to withdraw if the plea is based on the prosecutor's promise to recommend a disposition or to remain silent (Rule 11(e)(1)(B)), even if the court does not accept the recommendation. See Fed. R. Crim. P. 11(e)(2) advisory committee note 1979 amend. (citing *United States* v. *Savage*, 561 F.2d 554 (4th Cir. 1977)).

imposition of a prophylactic rule preventing the government, once it has made a plea proposal, from revoking or modifying it before the defendant has had a reasonable time to accept. See *United States* v. *Goodwin*, 457 U.S. 368, 384 (1982). The court of appeals perceived a possibility that the government could "take advantage of [the defendant's] acceptance of the plea proposal," perhaps by "exploit[ing] [his] decision to plead guilty by further hard bargaining and by recommending a longer sentence." *Ibid.* Assuming such conduct would violate due process rights,[18] the drastic remedy ordered by the court of appeals, which does not depend on any finding of improper conduct, is not required.

The best protection against abuse is the adversarial process of plea bargaining itself. "Plea bargaining flows from 'the mutuality of advantage' to defendants and prosecutors, each with his own reasons for wanting to avoid trial." *Bordenkircher* v. *Hayes*, 434 U.S. 357, 363 (1978) (quoting *Brady* v. *United States*, 397 U.S. at 752). In the " 'give-and-take negotiation common in plea bargaining,' " this Court has observed, " 'the prosecution and defense * * * arguably possess relatively equal bargaining power.' " 434 U.S. at 362 (quoting *Parker* v. *North Carolina*, 397 U.S. 790, 809 (1970) (opinion of Brennan, J.)). A defendant assisted by competent counsel is not without recourse in the face of what he considers a manipulative use of the plea bargaining system. It is a "simple reality that the prosecutor's interest at the bargaining table is to persuade the defendant to forego his constitutional right to stand trial." *Goodwin*, 457 U.S. at 378. A defendant may always elect to exercise the right which the prosecutor wishes him to abandon—he can go to trial.[19]

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[18] The validity of such an assumption is by no means obvious, where the bargaining is conducted by attorneys on an arm's length basis, and where the defendant's attorney is wholly free to engage in the same tactics.

[19] Moreover, a prosecutor who reneges on prior representations injures his reputation and his professional effectiveness. *State* v.

Perhaps there could be cases in which manipulative offers and withdrawals of plea proposals would so prejudice the defendant's rights as to violate due process.[20] In such instances, the courts are able to fashion appropriate remedies, perhaps including specific performance of a withdrawn proposal. The court of appeals' prophylactic approach is simply excessive.[21]

4. Nor does the Sixth Amendment right to effective assistance of counsel justify the judgment below. Relying on *Cooper*, 594 F.2d at 18-19, the court of appeals held:

> "Because prosecutors are required to conduct plea negotiations through defense counsel, the government's positions and communications in plea discussions are necessarily mediated through his [or her] counsel . . . . To the extent that the government attempts through defendant's counsel to change or retract positions earlier communicated, a defendant's confidence in his [or her] counsel's capability and professional responsibility, as well as the government's reliability, are necessarily jeopardized and the effectiveness of counsel's assistance easily compromised."

Pet. App. A10 (brackets and deletion in original). But the fact that defense counsel is the medium for communi-

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Edwards, 279 N.W.2d 9, 12 (Iowa 1979); see ABA Standards Relating to the Prosecutorial Function §§ 4.1-4.3 (approved draft 1971).

[20] The inherent safeguards of the plea bargaining situation are such, however, that while the reported "broken plea" cases show instances of mistake, misunderstanding, or poor organization, few if any reveal unfair prosecutorial manipulation.

[21] The court of appeals' remedy for potential prosecutorial abuse is even more extreme than that rejected by this Court in analogous circumstances in *Goodwin*. There, the court of appeals merely established a rebuttable presumption of abuse. Here, the court of appeals would not permit withdrawal of a plea proposal even if the government could prove the terms of the offer reflected an innocent mistake.

cation of positions and information—much of it, in the ordinary course of affairs, disappointing to the defendant—cannot support a constitutional claim of ineffective assistance of counsel. Under such a view, hardly a criminal trial could proceed without giving rise to an ineffectiveness claim. It may well be that the defendant's confidence in his counsel will be "jeopardized" by the communication of adverse results; the human tendency to blame the messenger is surely as strong in criminal defendants as in anyone. However, a claim of ineffective assistance of counsel requires evidence that the attorney's actual performance fell below the standard of practice in the community. A defendant's shaken confidence is not enough. *Scotland*, 614 F.2d at 363; see *Morris* v. *Slappy*, No. 81-1095 (Apr. 20, 1983).[22]

B. Finding A Constitutional Obligation To Perform A Plea Proposal In These Circumstances Would Be Inconsistent With Principles Governing The Remedies For *Santobello* Violations

When the government withdraws a plea proposal before the defendant has entered a plea or otherwise acted in reliance on it, the defendant is left in the same position he was in before the proposal was made. His rights to stand trial, confront his accusers, receive the assistance of counsel, and testify or remain silent are unimpaired.[23] He is in precisely the same position as a de-

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[22] That a defendant's loss of confidence in defense counsel could prejudice his Sixth Amendment rights is particularly farfetched here, where respondent's case was reassigned to a different public defender (as a means of redistributing the office's workload) the very day the State's plea proposal was withdrawn and modified. Aug. 22, 1979 Tr. 62-64. The court of appeals did not explain how respondent's loss of confidence in Hall—if any—could have impaired the effectiveness of successor counsel.

[23] If his rights are substantially impaired, he has suffered prejudice as a result of the proposal and its subsequent withdrawal; under our submission, therefore, he would generally be entitled to a remedy. See pages 13-14, *supra*.

fendant who, his consummated plea agreement having subsequently been breached by the prosecution, has been permitted to rescind his guilty plea and either replead or stand trial.

For example, a defendant may plead guilty to a particular charge in exchange for the prosecutor's agreement to dismiss other outstanding charges against him. If the court does not agree to the bargain, the defendant is permitted to withdraw his guilty plea and either replead or stand trial. Similarly, if the proposal were withdrawn by the prosecutor before the defendant had entered a plea (or otherwise changed his position in reliance on the plea proposal), rescission would restore the defendant to the status quo ante. He, like the defendant in the first example, would be free either to plead or to stand trial.

The constitutional law of remedies for government violations of consummated plea agreements (see *Santobello*, 404 U.S. at 263) is therefore relevant to the question of the constitutional obligations of the government to stand by offers made during the plea negotiations phase. To guarantee to the defendant who, like respondent, has neither pled nor otherwise acted in reliance on the plea agreement the benefit of his bargain would be incongruous, if the defendant who has actually entered a plea is entitled, as a matter of constitutional right, only to the remedy of rescission and not to the benefit of *his* bargain.

Yet, specific performance of plea agreements breached by the government is not, at least in the absence of detrimental reliance, prejudice, or other objective special factors, constitutionally mandated. **Mere rescission of the plea, with the right to replead or stand trial, is a constitutionally adequate remedy for the breach. The choice between rescission and specific performance is left to the discretion of the trial court, to be exercised in light of the specific circumstances of the case.** *Santobello*, **404 U.S. at 263.**

Subsequent court of appeals decisions have recognized that the choice of remedies for *Santobello* violations is a matter of discretion, not of constitutional right. *United States* v. *Carrillo*, 709 F.2d 35, 37 (9th Cir. 1983); *United States* v. *Garcia*, 698 F.2d 31, 37 (1st Cir. 1983); *United States* v. *Wilson*, 669 F.2d 922, 923 (4th Cir. 1982); *United States* v. *Cook*, 668 F.2d 317, 321 (7th Cir. 1982); *United States* v. *Williams*, 656 F.2d 357, 359 (8th Cir. 1981); *United States* v. *American Bag & Paper Corp.*, 609 F.2d 1066, 1068 (3d Cir. 1979); *Lepera* v. *United States*, 587 F.2d 433, 436 n.4 (9th Cir. 1978); *United States* v. *Bowler*, 585 F.2d 851, 856 (7th Cir. 1978). This point is made even more clearly in the the context of federal habeas review of state convictions, where, as one court stated:

> [T]he majority opinion in *Santobello* left to the state court's discretion the decision whether to remedy a prosecutor's broken promise by requiring specific performance of that promise or by rescinding the entire plea bargain. The conclusion: a state prosecutor's breach of a plea bargain is a violation of the Federal Constitution cognizable under 28 U.S.C. § 2254, but federal courts lack the supervisory authority to specify the remedy for such a violation.

McPherson v. *Barksdale*, 640 F.2d 780, 781 (6th Cir. 1980) (footnotes omitted). Accord, *Pierre* v. *Thompson*, 666 F.2d 424, 427 (9th Cir. 1982); *Patrick* v. *Camden County Prosecutor*, 630 F.2d 206 (3d Cir. 1980); *Palermo* v. *Warden, Green Haven State Prison*, 545 F.2d 286, 297 (2d Cir. 1976), cert. dismissed, 431 U.S. 911 (1977); *Mosher* v. *LaVallee*, 491 F.2d 1346, 1348 (2d Cir.), cert. denied, 416 U.S. 906 (1974) (dictum); *Johnson* v. *Beto*, 466 F.2d 478, 479-480 (5th Cir. 1972); cf. *United States ex rel. Culbreath* v. *Rundle*, 466 F.2d 730, 735 (3d Cir. 1972) (effectively leaving choice of remedy to state authorities).[24]

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[24] But see *United States ex rel. Baker* v. *Finkbeiner*, 551 F.2d 180, 183-184 (7th Cir. 1977); *United States ex rel. Ferris* v.

To be sure, in their exercise of discretion the courts have often found one or the other remedy to be required in particular circumstances. But there have been far too many cases where a rescission remedy has been ordered [25] to place much credence in the generalization that there is a "tendency of state and lower federal courts to order that broken plea agreements be remedied by specific performance rather than by rescission." Westen & Westin, *A Constitutional Law of Remedies for Broken Plea Bargains*, 66 Calif. L. Rev. 471, 528 (1978) (relied on by the court below (Pet. App. A10) and the *Cooper* court, 594 F.2d at 16 n.4, 18 n.8). In any event, we cannot agree with the inference (Westen & Westin, *supra*, 66 Calif. L. Rev. at 513 (cited at Pet. App. A10)) that this perceived tendency toward specific performance is an indication of an emerging "constitu-

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Finkbeiner, 551 F.2d 185 (7th Cir. 1977), cert. denied, 435 U.S. 932 (1978). These decisions are, however, questionable on several grounds. See *Lane* v. *Williams*, 455 U.S. 624 (1982).

[25] See, *e.g.*, *United States* v. *Cook*, 668 F.2d 317, 321 (7th Cir. 1982); *United States* v. *Crusco*, 536 F.2d 21, 26-27 (3d Cir. 1976); *United States* v. *Hammerman*, 528 F.2d 326 (4th Cir. 1975); *United States ex rel. Selikoff* v. *Commissioner of Correction*, 524 F.2d 650 (2d Cir. 1975), cert. denied, 425 U.S. 951 (1976); *Harris* v. *Superintendent, Va. State Penitentiary*, 518 F.2d 1173 (4th Cir. 1975); *United States* v. *Ewing*, 480 F.2d 1141, 1143 (5th Cir. 1973); *Allen* v. *Hadden*, 536 F. Supp. 586, 597 (D. Colo. 1982); *United States* v. *Baylin*, 535 F. Supp. 1145, 1150, 1152 (D. Del.), vacated on other grounds, 696 F.2d 1030 (3d Cir. 1982); *Nash* v. *Israel*, 533 F. Supp. 1378 (E.D. Wis. 1982), aff'd, 707 F.2d 298 (7th Cir. 1983); *Grant* v. *Wisconsin*, 450 F. Supp. 575, 579 (E.D. Wis. 1978); *State* v. *Chavez*, 130 Ariz. 438, 439, 636 P.2d 1220, 1221 (1981); *State* v. *Weig*, 285 N.W.2d 19, 21 (Iowa 1979); *Snowden* v. *State*, 33 Md. App. 659, 665-666, 365 A.2d 321, 325 (1976); *Johnson* v. *Commonwealth*, 214 Va. 515, 201 S.E.2d 594 (1974). The California Supreme Court has stated that a defendant is not entitled to specific performance of a plea bargain "'absent very special circumstances,'" *People* v. *Calloway*, 29 Cal. 3d 666, 672, 175 Cal. Rptr. 596, 599, 631 P.2d 30, 33 (1981) (citation omitted), principally because specific performance impairs the trial court's sentencing discretion.

tional protection [for] the personal expectations created in defendants by plea agreements with the state." [26]

The tendency, if any, of the state and lower federal courts to order specific performance in *Santobello*-type cases is readily understood without resort to a theory of constitutionally-protected expectation interests. This Court has recognized that specific performance is often the least disruptive remedy; in *Santobello*, the Court posed the question as "whether the circumstances of this case require *only* that there be specific performance of the agreement" (404 U.S. at 263 (emphasis added)). See also *United States* v. *Brown*, 500 F.2d 375, 378 (4th Cir. 1974) (describing specific performance as "the lesser relief"). Specific performance is often a more convenient remedy because it does not entail holding a trial. See *Garcia*, 698 F.2d at 37. Specific performance may be considered more appropriate once a significant portion of the sentence has been served. See *Palermo* v. *Warden, Green Haven State Prison*, 545 F.2d at 296-297; *Correale* v. *United States*, 479 F.2d 944, 950 (1st Cir. 1973). It is usually agreeable to both parties where the breach was minor or inadvertent. See *United States* v. *Green*, 543 F. Supp. 556, 558 (D. Nev. 1982). It is often preferred by the prosecution because the passage of time makes the prospect of successful retrial less likely. See *People* v. *Esposito*, 32 N.Y.2d 921, 300 N.E.2d 438, 347 N.Y.S.2d 70 (1973). And specific performance is generally more appropriate where the defendant has already given consideration other than the mere plea, such as testimony or cooperation with law enforcement officials. See *United States* v. *Carrillo*, 709 F.2d at 37 (cooperation with law enforcement officials); *United States* v. *Serubo*, 502 F. Supp. 290, 293-294 (E.D. Pa. 1980) (waiver of right to raise certain issues on appeal). In these cases, the government has already received what

[26] Interestingly, the Westen & Westin article presumes, contrary to the court below, that the government may rescind a plea proposal until the time a binding contract is formed. Westen & Westin, *supra*, 66 Calif. L. Rev. at 525 n.180 (citing *Shields* v. *State*, 374 A.2d 816, 818-819 (Del.), cert. denied, 434 U.S. 898 (1977)).

it bargained for, and it would not be possible to "wipe the slate clean" by merely vacating the plea.[27] With few exceptions (see note 24, *supra*), there is no suggestion in the opinions that the reason specific performance is granted is that the defendants' "expectation interests" are constitutionally protected.

Moreover—and more fundamentally—even when prescribing specific performance as a remedy for *Santobello* violations, the courts have nearly universally recognized that the selection of remedies is *discretionary*. The discretionary nature of the decision belies the existence of any constitutional right in a defendant to protection for his "personal expectations." In the absence of detrimental reliance or other objective prejudice to the defendant, his constitutional rights are fully vindicated if his guilty plea is vacated and he is free to replead or stand trial.[28]

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[27] We have noted our agreement (pages 9, 13-14, *supra*) with the Third Circuit's view in *Scotland*, 614 F.2d at 365, that a right to enforce a plea proposal may arise when a defendant has relied on the proposal to his detriment or is otherwise objectively prejudiced by its withdrawal. This principle, too, is supported by analogy to the *Santobello* remedy cases. Just as detrimental reliance or significant prejudice to the defendant in the case of a *Santobello* violation generally makes specific performance the preferred remedy, so also would justifiable detrimental reliance or other prejudice give a defendant a strong claim for enforcement of a withdrawn plea proposal. See *Scotland*, 614 F.2d at 365; *Serubo*, 502 F. Supp. at 293-294; *Tully* v. *Scheu*, 487 F. Supp. 404 (D.N.J.), rev'd on other grounds, 637 F.2d 917 (3d Cir. 1980), cert. denied, 454 U.S. 854 (1981); *State* v. *Brockman*, 277 Md. 687, 357 A.2d 376 (1976); cf. *Rowe* v. *Griffin*, 676 F.2d 524 (11th Cir. 1982). On the other hand, where the defendant in a *Santobello* situation has made a bare plea and can be restored to the status quo ante by the remedy of rescission, there is no compelling claim for specific performance. Similarly, where the defendant has taken no action in reliance on a plea proposal and is not objectively prejudiced by its offer and withdrawal, he has no due process right to compel enforcement of the withdrawn proposal. See *Aguilera*, 654 F.2d at 354.

[28] Even if a defendant's expectation interest in a consummated plea agreement were constitutionally protected by guarantee of a specific performance remedy, it would not necessarily follow that

C. The Decision Below Introduces Uncertainty Into The Plea Bargaining Process And Interferes With Judicial And Prosecutorial Discretion, To The Detriment Of The Public Interest In Just Punishments

The court of appeals' requirement of specific performance of government plea proposals should be overturned because, as we have demonstrated, it is not needed to remedy any violations of due process or Sixth Amendment rights. See *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16 (1971). The federal courts exercise no general supervisory authority over state criminal proceedings, and thus have no authority—in the absence of proven constitutional violations—to impose this sort of requirement, however strong the considerations of policy might be. *Murdock* v. *City of Memphis*, 87 U.S. (20 Wall.) 590 (1875); see also *United States* v. *Lovasco*, 431 U.S. 783, 790 (1977). We would submit, however, that even on grounds of policy the decision below was mistaken.

First, the decision introduces grave uncertainty into the plea bargaining process, thereby frustrating one of the key purposes of Fed. R. Crim. P. 11(e) and analogous state rules such as Ark. R. Crim. P. 24-26, *reprinted in* Ark. Stat. Ann. § 43 App. (1977).[29] Rule 11(e) requires that the terms of a plea be disclosed in open court on the record, and that the full inquiry into its accuracy and voluntariness also be recorded verbatim. See Fed. R. Crim. P. 11(e)(2), (5) and (6)(g); cf. Ark. R. Crim. P. 24.5, 24.7, 25.3(d). As this Court discussed in *Blackledge* v. *Allison*, 431 U.S. 63, 79-80 (1977), these "commendable procedures" create a record clearly showing whether a bargain exists and what its terms are. This

a defendant's expectation interest in a mere plea proposal would be deserving of the same constitutional protection. In the *Santobello* situation, the defendant has performed and the government has already received the benefits of its bargain; here, the defendant has not performed and the government has no right to compel performance. The equities of the defendant in the *Santobello* situation are far more compelling.

[29] Having been adopted in 1976, the Arkansas rules governing guilty pleas did not apply to the events at issue here.

permits "quick disposition of baseless collateral attacks" (*id.* at 80 n.19) and "insure[s] that [the plea agreement is] not ignored" (*id.* at 80). The facts of *Allison* strikingly illustrate the importance of the Rule 11 procedures: because no record was made of the terms under which Allison pleaded guilty, his subsequent assertions that a plea agreement had been made but later violated required an evidentiary hearing on his petition for habeas corpus, thus "eliminat[ing] the chief virtues of the plea system—speed, economy, and finality." *Id.* at 71; see *United States* v. *Timmreck*, 441 U.S. 780, 784 (1979).

The decision below would return us to the days of *Allison*. If defendants are entitled to enforcement not just of plea agreements solemnly agreed to and recorded in court, but also of proposals orally made and later repudiated by the government, then the courts will again be faced with the onerous task of deciding—after the fact and without documentary evidence—whether a bargain was struck and, if so, what its terms were. See, *e.g.*, *Plaster* v. *United States*, 720 F.2d 340 (4th Cir. 1983); *Stone* v. *Cardwell*, 575 F.2d 724 (9th Cir. 1978). The "commendable procedures" of Fed. R. Crim. P. 11(e) and Ark. R. Crim. P. 24-26 would be rendered irrelevant. In the absence of detrimental reliance or other substantial prejudice to the defendant, we believe that it would be a mistake to sacrifice the relative certainty of Rule 11-type procedures to return to the informal, ambiguous, unrecorded plea agreements of the past.[30]

Second, the decision below interferes with judicial and prosecutorial discretion, to the detriment of society's interest in just punishment of those who violate its laws. See *Wade* v. *Hunter*, 336 U.S. 684, 688 (1949). The ultimate authority to determine the sentence to be imposed on convicted criminals is vested in the court—in this instance, the state court. A plea agreement, properly entered into, does not interfere with the court's discre-

[30] Largely for these reasons, the New York courts have adopted a rule, upheld against constitutional challenge in *Siegel* v. *New York*, 691 F.2d 620 (2d Cir. 1982), cert. denied, No. 82-1108 (Feb. 22, 1983), limiting enforcement of plea agreements to those whose terms are placed on the record.

tion: the court is free to accept or reject a sentence recommendation or the entire agreement. See *Santobello*, 404 U.S. at 262; *Lynch* v. *Overholser*, 369 U.S. 705, 719 (1962); Fed. R. Crim. P. 11(e)(1)(B), (4).

But to grant specific performance of a plea proposal simply because the prosecutor sought to withdraw it would enable "a defendant and prosecutor * * * to bind a trial court," so that it would not be able "to weigh the presentence report and exercise its customary sentencing discretion." *People* v. *Kaanehe*, 19 Cal. 3d 1, 14, 136 Cal. Rptr. 409, 418, 559 P.2d 1028, 1037 (1977) (footnote omitted). It would effectively displace the trial court's discretion to accept or reject the plea. See *Hammerman*, 528 F.2d at 332; *Baylin*, 535 F. Supp. at 1152. The problem is most acute in the case of agreements involving specification of a particular sentence (see Fed. R. Crim. P. 11(e)(1)(C)). In such cases, specific performance of a plea proposal offered by the prosecutor would usurp the court's entire role.[21] Even where the plea proposal involves merely a recommended sentence (see Fed. R. Crim. P. 11(e)(1)(B)), however, the sentencing court's discretion is jeopardized, as this very case illustrates. The Arkansas court, in its discretion, sentenced respondent to 21 years in prison, to be served consecutively to his prior sentences. As a result of the plea proposal, however, the court of appeals ordered respondent resentenced to 21 years, to run *concurrently*. Respondent was thus given more than specific performance, and the sentencing court's discretion was abrogated in the bargain.[22]

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[21] This is particularly significant where, as here, the prosecutor's proposed plea was a mistake. Had the prosecutor gone ahead with the original proposal of a 21-year concurrent term, the court might well have found the proposal inadequate, and compensated for the prosecutor's error by rejecting the plea or imposing a stiffer sentence. Notwithstanding defendant's "personal expectations," such a disposition would be proper. The court of appeals' judgment, however, eliminates the trial court's discretion as a corrective for prosecutorial mistakes.

[22] It would have been preferable for the court of appeals to require the state court to resentence petitioner with the benefit

The decision below interferes with prosecutorial discretion as well. During the pre-trial stage, a prosecutor "may uncover additional information that suggests a basis for further prosecution or he simply may come to realize that information possessed by the State has a broader significance." *Goodwin*, 457 U.S. at 381. Thus, "[a] prosecutor should remain free before trial to exercise the broad discretion entrusted to him to determine the extent of the social interest in prosecution. An initial decision should not freeze future conduct." *Id.* at 382 (footnote omitted). The court of appeals' decision fails to take this necessary fluidity into account. While recognizing that "the government can withdraw a plea proposal or reopen plea negotiations, even after the plea proposal has been accepted by the defendant" if the proposal was "based on inaccurate or incomplete information" (Pet. App. A13), the decision below would remove the discretion to make that judgment from the prosecutor and vest it in the court. See *ibid.* (the government must "demonstrate[]" that the proposal was based on inadequate information.)[33]

Moreover, as this very case illustrates, the court would adopt an unrealistically restrictive view of the instances in which the government should be permitted to modify its proposals. Here, the court would not permit the government to correct an innocent misstatement—a confusion of "concurrent" with "consecutive"—even though the mistake was discovered and corrected the next business

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of the state's recommendation of a concurrent 21-year term. Presumably, the court of appeals considered such a disposition inadequate to protect respondent's "expectation interests."

[33] We find it puzzling that the court would conclude that mistakes based on inadequate information may be corrected by the government, but that mistakes based on misstatements, as here, or based on inadequate understanding of prosecutorial policy, as in *Cooper*, are not. If the court were serious about the defendant's constitutionally-protected "expectation interests," it should not tolerate this exception for inadequate information. If, however, a defendant's "expectation interests" are overridden in some cases by the government's need to determine the severity of charges on an informed basis, why not here?

day. To make every plea proposal binding in this fashion is, as *Goodwin* observed, "to presume that every prosecutor is infallible—an assumption that would ignore the practical restraints imposed by often limited prosecutorial resources." 457 U.S. at 382 n.14. We see no virtue in a rule that enables criminal defendants, as a matter of constitutional law, to capitalize on the misstatements of government lawyers. Cf. *Federal Crop Insurance Corp* v. *Merrill*, 332 U.S. 380 (1947). Until a defendant has relied to his detriment on a plea proposal, the prosecutor's discretion to correct mistakes, to respond to changing circumstances, or even to change his mind, should not be impaired. *Goodwin*, 457 U.S. at 381-382.

The ultimate consequence of interference with judicial and prosecutorial discretion is borne by the public. Both court and prosecutor are vested with discretion for a reason: to exercise their best judgment to ensure that justice is done. Artificial rules making oral proposals binding and subsequently enforceable against the best judgment of court and prosecutor do not enhance due process, but only impede the just enforcement of society's laws.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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FEBRUARY 1984

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No. 83-328-CFH
Status: GRANTED

Title: James Mabry, Commissioner, Arkansas Department of Correction
v.
George Johnson

Docketed:
August 29, 1983

Court: United States Court of Appeals for the Eighth Circuit

Counsel for petitioner: Clark,John Steven

Counsel for respondent: Quiggle,Richard

Entry	Date	Note	Proceedings and Orders
1	Aug 29 1983	G	Petition for writ of certiorari filed.
2	Sep 24 1983		Supplemental brief of petitioner Mabry, Commr., etc. filed.
3	Oct 3 1983		Waiver of right of respondent George Johnson to respond filed.
4	Oct 5 1983		DISTRIBUTED. October 28, 1983
5	Oct 17 1983	F	Response requested.
6	Nov 22 1983		REDISTRIBUTED. December 9, 1983
7	Nov 21 1983	X	Brief of respondent George Johnson in opposition filed.
8	Nov 28 1983	G	Motion of respondent for leave to proceed in forma pauperis filed.
9	Dec 12 1983		Motion of respondent for leave to proceed in forma pauperis GRANTED.
10	Dec 12 1983		Petition GRANTED.
			**********
11	Jan 11 1984	G	Motion of respondent for appointment of counsel filed.
12	Jan 16 1984		DISTRIBUTED. January 20, 1984. (Above motion).
13	Jan 23 1984		Motion for appointment of counsel GRANTED and it is ordered that Richard Quiggle, Esquire, of Little Rock, Arkansas, is appointed to serve as counsel for the respondent in this case.
14	Jan 30 1984		Brief of petitioner Mabry, Commr., etc. filed.
15	Jan 30 1984		Joint appendix filed.
16	Feb 1 1984		Brief amicus curiae of United States filed.
17	Feb 6 1984		Record filed.
18	Feb 6 1984		Certified original transcript of record & C.A. proceedings, 4 volumes, received.
19	Feb 13 1984	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
20	Feb 27 1984		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
21	Feb 28 1984		Brief of respondent George Johnson filed.
22	Mar 20 1984		SET FOR ARGUMENT. Monday, April 16, 1984. (2nd case).
23	Mar 26 1984		CIRCULATED.
24	Apr 9 1984	X	Reply brief of petitioner Mabry, Commr., etc. filed.
25	Apr 16 1984		ARGUED.